Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Ralph P. Forbes,
Citizen In His Own Proper Person
Box 88
London AR 72847
501/293-4641

QUESTIONS PRESENTED FOR REVIEW

- I -

Whether the Court of Appeals erred in not exercising ırisdiction and judicial duty to determine if the F.C.C.'s rocedures meet: A] statutory requirements for 1] purpose;] timeliness; 3] reasonableness; and, 4] lawful authority;

And B] the constitutional mandates *re* due process, qual protections, expression and all rights explicitly and nplicitly protected by the Law of the Land, the Constitu- on and the First, Fifth, Seventh, Ninth and Fourteenth mendments thereto?

- II -

Whether it is unreasonably burdensome to require etitioner to pursue alleged administrative "remedies" hen the procedural process: A] has been exhausted by ef- ctual final order and/or unreasonable agency delay; B] is ot an adequate remedy at law to redress injuries; C] has roven incompetent and inadequate to protect the vital onstitutional rights of the petitioner, political candidates general, and the bedrock, "paramount" rights of the eople; and, D] is an exercise in futility?

- III -

Assuming that the Court of Appeals was correct as to oints number I and II, whether the exhaustion of an ad- inistrative complaint with the F.C.C. is a prerequisite for Plaintiff seeking to utilize 42 U.S.C. §1983 and/or §1985(3) vindicate rights under 47 U.S.C. §312 and/or §315(a)?

- IV -

Whether the Court of Appeals erred in holding that e Petitioner's Complaint did not state a cause of action nder 42 U.S.C. §1983 and/or §1985(3)?

PARTIES TO THE PROCEEDING

RALPH P. FORBES, INDEPENDENT CANDIDATE NOMINATED BY THE PEOPLE, QUALIFIED VOTERS TO REPRESENT THEM IN THE UNITED STATES CONGRESS FROM THE 3rd CONGRESSIONAL DISTRICT OF ARKANSAS

PETITIONER

- vs. -

THE ARKANSAS EDUCATIONAL TELEVISION COMMISSION NETWORK FOUNDATION, ITS BOARD OF DIRECTORS, AND EMPLOYEES, IN THEIR OFFICIAL CAPACITIES;

THE ARKANSAS EDUCATIONAL TELECOMMUNICATIONS AND ITS MEMBERS AND OFFICERS;

SUSAN J. HOWARTH, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR;

VICTOR FLEMING, IN HIS OFFICIAL CAPACITY AS CHAIRMAN;

G.E. CAMPBELL, IN HIS OFFICIAL CAPACITY AS VICE-CHAIRMAN;

Dr. CAROLINE WHITSON, IN HER OFFICIAL CAPACITY AS SECRETARY;

COMMISSIONER DIANE BLAIR,
IN HER OFFICIAL CAPACITY;

COMMISSIONER S. McADAMS,
IN HIS OFFICIAL CAPACITY;

COMMISSIONER JAMES ROSS,
IN HIS OFFICIAL CAPACITY;

COMMISSIONER JERRY McINTOSH,
IN HIS OFFICIAL CAPACITY;

PARTIES TO THE PROCEEDING

COMMISSIONER LILLIAN SPRINGER, IN HER OFFICIAL CAPACITY;

AMY L. OLIVER, IN HER OFFICIAL CAPACITY AS PRODUCTION MANAGER;

WILLIAM CLINTON, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF ARKANSAS;

aka AETN (THE AETN-TV DEFENDANTS);

AND,

COMMERCIAL TELEVISION BROADCASTING STATIONS KHBS TV/CHANNEL 40 UHF, FORT SMITH, ARKANSAS; ITS AFFILIATE KHOG TV/CHANNEL 29 UHF, FAYETTEVILLE, ARKANSAS; SIGMA BROADCASTING, INC.; THE AMERICAN BROADCASTING COMPANY aka ABC; AND THEIR AGENT DARREL CUNNINGHAM;

aka KHOG (THE KHOG-TV DEFENDANTS);

RESPONDENTS

+

AMICUS (BELOW)

THE FEDERAL ELECTION COMMISSION aka F.C.C.

THE ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS, NATIONAL PUBLIC RADIO, THE ORGANIZATION OF STATE BROADCASTING EXECUTIVES AND THE PUBLIC BROADCASTING SERVICE

(AMICI CURIAE)

+

INTERESTED PARTIES

AMERICAN CIVIL LIBERTIES UNION OF ARKANSAS aka ACLU

THE RUTHERFORD INSTITUTE; Etc.

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Petitioner, Ralph P. Forbes, Citizen, unschooled in law, respectfully prays that a writ of certiorari issue to review portions of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit affirming the Court below, including and in particular, the paragraphs captioned "A. Statutory Claims," the holding requiring petitioner to first exhaust his administrative remedies prior to claiming redress from the defendants. (App. 6a, 7a).

OPINIONS BELOW

The April 28th, 1994, opinion of the Court of Appeals reported in *Forbes v. AETN*, 22 F.3d 1423 (8th Cir. 1994), and correlated orders appear in Appendices A ~ G to this Petition. (App. 1a ~ 28a).

JURISDICTION

The Court of Appeals' Order and Judgment in this matter was filed on April 28th, 1994. On June 14th, 1994, the petition for rehearing by the AETN appellees was denied. On June 21, 1994, appellant Forbes' petition for rehearing as to limited portions of the Eighth Circuit's Order was denied. On July 19, 1994, appellant Forbes' petition to recall mandate was denied. This Court's appellate and *sua sponte,* plenary jurisdiction is invoked under Article III; Title 28 U.S.C. §§ 1254(1); 158 & 1651; and because the Court of Appeals for the Eighth Circuit has decided an important question of federal law that petitioner believes should be reversed by this Court because it is in conflict with: [1] the Constitution; [2] applicable decisions of this Court; [3] other Circuits; and, [4] its own rulings.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Constitution of The United States: Article I, Sections 1 & 2; Article III, Section 2(1); Article IV, Sections 2(1) & 4; Article VI, Sections 2 & 3; Amendments I; V; VII; IX & XIV; **United States Code**: Title 5 U.S.C. § 555; § 706; 28 U.S.C. § 158; §§ 1331, 1332; § 1343; § 1357; § 1651; §§ 2201, 2202; § 2342; 42 U.S.C. § 1973(j)(f); §§ 1983, 1985 (3) & 1986, *et seq.*; 47 U.S.C. §§ 312 (a)(7), 315; & § 402;

Federal Communications Commission (FCC): CFR 73.1941(a); 1944 (a)(b); FCC 8210-AJZ/MJM, *Pepper Letter*, 21 August, 1992; DA 92-1503, *Becker Letter*, October 30, 1992; *Request for Declaratory Ruling Concerning Access to Time on Broadcast Stations*, 25 F.C.C.2d 216 (1970); *Testimony of Federal Communications Commissioner to United States Senate Subcommittee on Communications*, (1969); *Joint Appendix 69 of the FCC*; pertinent parts of which appear in Appendices H ~ J. (App. 29a ~ 52a).

STATEMENT OF THE CASE OVERVIEW

The gravamen of the case is *censorship of protected speech,* and unlawful discrimination, by two groups of defendants in two distinct, albeit related torts. The grounds for appeal are the inadequacies of administrative procedures:

(1) to protect fundamental rights in the first instance;

And (2) to provide redress after the failure to prevent irreparable harm. The Circuit Court's narrative of the case is concise and well recited; and petitioner respectfully calls the Court's attention to the Appendix at pages 2a ~ 11a; 72a ~ 81a; 152a ~ 158a; 196a, 197a; 210a; & 214a, *et seq*.

The AETN Defendants: In the 1992 election cycle, the major debates, *purportedly for purposes of informing the Arkansas electorate of candidates and their positions on issues,* were staged, sponsored and paid for *by the state* via The Arkansas Educational Television Commission Network Foundation, *aka* AETN. Invoking his rights under the aegis of the 1st and 14th Amendments to the United States Constitution; 47 USC 315; the Arkansas State Constitution and the federal and state laws governing AETN; petitioner Forbes informed defendants that he was a legally qualified candidate for United States Congress and respectfully requested his rightful place in the state-staged debates, scheduled for October 22nd, 1992. (App. 54a). AETN refused to allow the people to hear Forbes and his views; whereupon Forbes appealed to the FCC. The FCC told Forbes *not to "waste" his and everyone else's time,* because he would ultimately, *inevitably* be turned down; *but the FCC's procedures could not be exhausted until long after the debate and the election*

would be over. (App. 58a). Forbes thereupon wrote a letter requesting the FCC to bypass or short-circuit their fatal procedures and *unreasonable agency delay,* so Forbes would have *a timely* denial to appeal to a court of law. (App. 62a). [1]

The belated FCC response claimed: (1) to have no knowledge of the petitioner's call; and (2) to contain a "political package" on FCC procedures. There were *no* enclosures. (App. 63a).

When it became apparent that the FCC had *de facto* made its *final decision* by failing to mandate AETN to comply with the law; Forbes, knowing no other adequate remedy under law, filed a complaint (praying leave to amend because of exigencies) with a petition for emergency injunctive relief, in the United States District Court. (App. 72a; 75a, ¶10; 80a, ¶36).

While it is true our courts are overburdened; and, *in theory*, competent, efficient, law abiding administrative agencies *should* relieve much load from our judiciary: *the reality is the FCC's unreasonable delays, improperly withheld relief and 100% failure to protect the paramount rights of the people and the rights of individual citizens, results in excessive litigation.*

In stark contrast to the FCC's putative "comprehensive mechanism for remedy and enforcement of federal rights"

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[1] "Because of the *time limitation inherent* in a political campaign, erroneous (censorship) decisions by a station (must be) be corrected ... *promptly enough to permit the candidate to bring improperly excluded matter before the public (prior to the election).*" (Italics supplied.)
WDAY, infra, 360 U.S. at 530, 79 S.Ct. at 1306; (App. 126a; 199a, 200a; 212a).

"[T]he Court upheld the right of access for federal candidates imposed by § 312(a)(7) of the Communications Act both because that provision 'makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process,' ... "
F.C.C. v. L.W.V. of California, 468 U.S. at 379, 104 S.Ct. at 3117

This honorable Supreme Court *unanimously* held: *"It is the right of the viewers and listeners,* not the right of the broadcasters *which is paramount."*
Red Lion, 395 U.S. at 390; 89 S.Ct. 1806; 23 L.Ed.2d 371 (1969)

"It is particularly important that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and positions on vital public issues *before* choosing among them on election day." *Buckley v. Valleo,* 424 U.S. at 52, 53.
(Please see, *e.g.,* App. 82, 83a; 103a, 104a; 148a, 149a; *cf.* 199a.)

(denial of due process, and *utter failure* to act on petitioner's complaints for *two years);* petitioner Forbes's motion for relief *in the courts* resulted in one *ex parte* hearing, a hearing before a single Appellate Judge, *and* a Three Judge Appellate Panel, *all within 48 hours prior to the October 22nd debate.*

(*cf.*, App. 67a, 68a; 101a; 185a; 187a, ¶9; 212a).

The KHOG Defendants: As the election day, November 3, 1992, drew near, and AETN's hostility and invidious censorship, shielded by FCC inaction and antagonism, had denied the people their paramount right to hear Forbes' views;

Petitioner Forbes' only reasonable option to exercise his rights of free expression, to present his views (if only in a condensed and abbreviated form) to the voters was to run 30 second spot ads on the six commercial television broadcasting stations in Arkansas' 3rd congressional district. After viewing the tapes, the management of all six stations admitted the ads were very effective; but they objected to Petitioner Forbes' views and the potent way he expressed them. [2]

Because of limited funds the spots were scheduled to run only during *the critical last weekend* before the November 3rd election, beginning Friday evening, October 30th, 1994.

THE CENSORED AD objected to most vehemently by the defendants consisted of quotes from *The Holy Bible* and the author of our *Declaration of Independence.*

(Please see App. at 52a and 53a.)

The agreement with the ABC stations was made with K-HOG-TV 29 in Fayetteville, but they requested that Petitioner Forbes deliver the video cassettes to their Fort Smith sister station on Friday afternoon, just prior to the scheduled broadcasts. The KHOG/KHBS defendants stalled Forbes until *after* the FCC offices closed *for the weekend.* Then defendant Cunningham announced Forbes' political ads were banned as "obscene." He claimed to be acting under color of a

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[2] The ABC affiliates, owned by Sigma Broadcasting, Inc., KHOG-TV 29 of Fayetteville and KHBS-TV 40 of Fort Smith; NBC affiliates, KPOM-TV 24 of Fort Smith and KFAA-TV 51 of Rogers; and CBS affiliate KFSM-TV 5 of Fort Smith and its sister station in Fayetteville, Ark.

last minute FCC ruling issued in the Becker case.[3]
(App. 48a, 177 ~ 180a, 185a).

As a matter of fact and law, not only was the Becker case irrelevant to and disparate from the ads of Forbes and others with similar views, content and expression; but the Becker letter specifically prohibited and enjoined defendants Cunningham, KHOG & KHBS, and all other licensees from censoring the ads of Forbes or any candidate with ads of cognate content. (App. 44a; 144a, 145a; 173a, 174a).

The FCC failed to protect Forbes and the voters of Arkansas' third district from suffering irreparable harm to their most vital and fundamental rights. Therefore Forbes was forced by defendants to lodge this Action as *the only adequate remedy for redress at law.* Forbes immediately amended the complaint to include the KHOG defendants for censoring his ads. (Please see App. 76~81a; 210a~213a.)

On November 2, 1992, candidate Forbes sent a letter to Mr. Milton Gross of the FCC complaining of the unlawful, invidious, arbitrary, capricious and malicious censorship of his protected ads by the KHOG defendants. (App. 67a.)

The FCC was sufficiently aware of and motivated by this case so that on August 17, 1993, the FCC filed an amicus brief in the Eighth Circuit vigorously opposing petitioner on behalf of the defendants in this matter.
(Please see App. 168a ~ 195a; 218a.)

On June 28th, 1994, Petitioner Forbes wrote to Mr. Gross asking about the status of his November 2, 1992, complaint. Mr. Gross replied in a letter dated July 19, 1994, which disingenuously claimed the FCC was *unaware* of Forbes' complaints. Once *again* the materials claimed to be enclosed from the FCC were not. The letter adds, "*all the complaints in this area which we have received from a num-*

[3] The Forbes and Bailey footage were specifically declared *not* indecent by the FCC. The FCC's October 30th Becker letter, published at *the close of the business week,* was used as a pretext by television stations *all over the nation to ban political ads* of numerous candidates who shared Forbes' views *during the final critical 72 hours* before the 1992 elections, in violation of 47 C.F.R. § 73.1944(b). (App. J, 44a; 185a; 225a).

ber of candidates in various jurisdictions" are being held "in abeyance" until the Commission releases its decision on the issues raised by the Notice. (App. 68a, 69a). [4]

While it is incontestably true that [1] the FCC should have *immediately* required the KHOG defendants to run candidate Forbes' scheduled ads *without censorship;*

And, [2] the FCC should have penalized the KHOG defendants severely enough so that neither they nor any other licensees would violate Forbes' or any other candidate's rights, and especially not rape the paramount rights of the public, in any future elections. But it is a *non sequitur,* and patently unjust, to penalize Forbes *because the FCC failed to act in an appropriate and timely manner.*

ADMINISTRATIVE vs. JUDICIAL JURISDICTION

Petitioner Forbes maintains his complaint is proper under 28 USC §§ 1331 {*e.g., Public Citizen Health Research Group v. Commissioner. Food & Drug Administration ("PCHRG v. FDA")*, 740 F.2d at 34-35}, 1343, 1357, 2201, 2202; 42 USC §§ 1973, 1983, 1985, *et seq.*, so that original jurisdiction lies with trial by jury in Article III District Court rather than the self-contradictory, administrative labyrinth as more fully shown herein. [5]

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[4] This practice is aptly nailed by what a three judge panel in the 8th Circuit labeled, in another voters' rights case (*Jeffers v. Clinton*), an unlawful "SPP" {aka *"standard practice and procedure"}, that is imposed or applied "in a manner which results in a denial or abridgement of the right of any citizen ..."* *cf., MacBride v. Exon,* 558 F.2d 443 at 449 (8th Circuit, 1977) (App. 235a).

"... But review of the order by *a licensee* in *such a proceeding affords no adequate remedy.* If ever instituted, which is uncertain, *it would come too late to save appellant from the injury wrought by the outlawry of its contracts."* *Columbia Broadcasting System, Inc. v. United States (CBS v. U.S.),* 316 U.S. at 424, 62 S.Ct. at 1203, 86 L.Ed 1563 (1942)

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[5] "... Forbes' remedy for a violation of his constitutional rights would be a suit in federal court, *not* an administrative procedure before the FCC. *Kokinda,* 110 S.Ct. 3115; *Perry,* 460 U.S. at 49, 103 S.Ct. at 957; *Cornelius,* 473 U.S. at 788, 105 S.Ct. 3439; *Lehman v. City of Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714 (1974)." Respondent's Brief in Opposition at 8, *AETC v. Forbes,* No. 94-490, *cert den.*

Dante may well have had a vision of the FCC's bureaucratic, labyrinthine ways when he wrote: *"All hope abandon, ye who enter here."* Petitioner denies and at all times has objected to the extort that the FCC has any lawful authority over him or his rights as a United States Citizen. Assuming, *arguendo*, that petitioner is required to continue to exhaust his fruitless FCC remedies before he can proceed, petitioner makes the following additional arguments:

If Petitioner Forbes' remedy lies first within the FCC maze, although he is an aggrieved person, manifestly his status in not under 47 USC § 402(b). If § 402(a) applies, then 28 USC §158 is triggered. Obviously, this is not a bankruptcy case, so only the district court and court of appeals jurisdiction portions apply; which means Forbes must appeal to the district court, which he did when he filed his complaint, and appeal from there to appellate court, from which he now appeals. [6] It is well settled that where a case involves questions of importance to administration of the Communications Act, the Supreme Court of the United States would grant certiorari. *FCC v. Allentown Broadcasting Corp.*, 349 U.S. at 365, 75 S.Ct. at 859 (1955)

This Court long ago recognized: *Justice delayed is justice denied.* It is unreasonable to require Petitioner Forbes to go through the futile ritual of exhausting so-called administrative "remedies" with the FCC (*e.g.*, Appendices U & V, 82 a~140a) for each and all of the following additional reasons:

While Forbes is not under the jurisdiction of the FCC; 5 USC §555 does impose *a due process obligation on the FCC* "to conclude a matter presented to it" *"within a reasonable time"* and with *"due regard for the ... necessity of*

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[6] Under this theory, *the 8th Circuit's remand is in direct conflict with the law of the Court of Appeals, D.C. Cir.*, which declares: *exclusive jurisdiction lies in the Court of Appeals. TRAC v. FCC*, 750 F.2d at 75 (1984) & *ALPA*, 750 F.2d 81. (App. 38a; 42a; 175a; 181a; 218a, 219a).

Even absent explicit judicial review provisions, there is always a "strong presumption" that agency action is reviewable. *Dunlop v. Bachowski*, 421 U.S. 560, 567, 95 S.Ct. 1851, 1857, 44 L.Ed.2d 377 (1975)

the parties" and to give "*prompt notice*" *of denial* "*in whole or in part*" of a "written application, petition, *or other request* of an interested person made in connection with *any* agency proceeding." (App. 37a; 58 ~ 69a).

If Forbes is not yet free from inadequate, incompetent and inapplicable administrative entanglements, then he invokes 5 USC § 706 *in its entirety* coupled with 28 USC § 1651 and 28 USC § 2072 to petition this honorable Court to use its plenary powers to protect his God-given, statutory and due process rights secured by the Constitution of the United States, including the First and Fourteenth Amendments thereto. (App. 29a ~ 31a; 32a ~ 34a; 43a). [7]

TIMELY PROCEDURE IS REQUIRED TO PROTECT AGAINST PRE-ELECTION CENSORSHIP

This Court proscribed censorship of protected political expression, whether by government control over private licensees, or *by private licensees invoking governmental regulation as a guise* or a cloak in *Farmers Educational & Coop. Union, etc. v. WDAY (WDAY)*, 360 U.S. 525, 79 S.Ct. 1302, 3 L.Ed.2d 1407 (1959):

"... The term censorship, however, as commonly understood, connotes *any* examination of thought or expression in order to prevent publication of 'objectionable material.' " (Emphasis in original; *WDAY* at 79 S.Ct. 1304 & 360 U.S. 527.)

"... [J]udicial interpretations of § 315 have with considerable uniformity recognized that a licensee has no such power. . . Similarly, the legislative history of the measure both prior to its first enactment in 1927, and subsequently, shows a deep hostility to censorship either by the Commission or by a licensee. 6

"6. See S.Rep. No. 1567, 80th Cong. 2d Sess. 13-14 (1948), where discussing S. 1333, the Committee Report stated:

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[7] Just as the FAA enforcement manual handbook was written to guide the FAA staff *but not intended to affect the rights, duties or conduct* of pilots; so *47 USC 315 prohibits* the FCC *and broadcasters* from *censoring* expression, *its purpose* is *not* to infringe or annul, *but to protect* the rights of candidates and the paramount right of the people to be informed. *cf. Capuano v. National Transportation Safety Board*, 843 F.2d 56 (1st Cir. 1988).

> " ' The flat prohibition against the licensee of any station exercising any censorship authority over any political or public question discussion is retained and emphasized. This means that the Commission cannot itself or by rule or regulation require the licensee to censor, alter, or in any manner effect or control the subject manner of any such broadcast and the licensee may not in his own discretion exercise any such censorship authority. * * *
>
> * * * * *
>
> " '... the ... act . . . makes clear that the Commission has absolutely no power of censorship over radio communications and that it cannot impose any regulation or condition that would interfere with the right of free speech by radio.' "
>
> *WDAY*, 79 S.Ct. at 1305, 360 U.S. at 528

"... Recognizing radio's potential importance as a medium of communication of political ideas, Congress sought to foster its broadest possible utilization by encouraging broadcasting stations to make their facilities available to candidates for office without discrimination, and by insuring that these candidates when broadcasting were not to be hampered by censorship of the issues they could discuss. Thus, expressly applying this country's tradition of free expression to the field of radio broadcasting, *Congress has from the* [530] *first emphatically forbidden the Commission to exercise any power of censorship over radio communication.*[7] *It is in line with this same tradition that the individual licensee has consistently been denied 'power of censorship' in the vital area of political broadcasts.*" {Italics supplied; n. 7 omitted.}

WDAY, 79 S.Ct. at 1305, 360 U.S. at 529-30

"... Such issues have always troubled courts. Yet, under {FE&CU}'s view of the statute they would have to be resolved by an individual licensee during the stress of a political campaign, often, necessarily, without adequate consideration or basis for decision. Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation *under the guise* of lawful censorship of libelous matter. *Because of the time limitation inherent in a political campaign, erroneous decisions by a station could*

not be corrected by the courts promptly enough to permit the candidate to bring improperly excluded matter before the public. It follows from all this that allowing censorship, even of the attenuated type advocated here, would almost inevitably force a candidate to avoid controversial issues during political debates over radio and television, and hence restrict the coverage of consideration relevant to intelligent [531] political decision. *We cannot believe,* and we certainly are unwilling to assume, *that Congress intended any such result.*"

WDAY, 79 S.Ct. at 1306, 360 U.S. at 530-531

"... Here, petitioner is asking us to attribute to § 315 a meaning which would either *frustrate the underlying purpose for which it was enacted,* or alternately *impose unreasonable burdens* on the parties governed by that legislation. In the absence of clear expression by Congress we will not assume that it desired such a result. . . We merely read § 315 in accordance with what we believe to be its underlying purpose." [8] {Emphasis supplied throughout.}

WDAY, 79 S.Ct. at 1308, 360 U.S. at 535

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[8] While four Justices dissented on grounds of state rights; **the Court was unanimous in decreeing that *this section (§ 315) forbids censorship by licensees.***

If the New York commission's system of notifying publishers that certain materials were found to be objectionable for sale to minors was based on "radically deficient" procedures, and therefore condemned because the "system was found to constitute an 'informal scheme of ... censorship' " ... (*Bantam Books, Inc. v. Sullivan*, 372 U.S. at 71, 72, 83 S.Ct. 631): then, the FCC's radically defective, hostile procedures that impose unreasonable burdens; that reek with disdain, rather than *"due regard for the (reasonable time) necessity of the parties"*; that *subvert "the underlying purpose for which it was enacted"* must also be condemned as a *formal* scheme of *censorship.*

If this Court's "insistence that regulations of obscenity scrupulously embody the most rigorous procedural safeguards" (*Id.*, 372 U.S. at 66, 83 S.Ct. 637) is the law; then certainly the public's paramount right to be informed, and the rights of political expression by candidates are entitled to at least equally rigorous scrutiny and safeguards. *cf., Southeastern Promotions, Ltd. v. Conrad,* 420 U.S. 546, 95 S.Ct. 1239, 44 L.Ed.2d 448 (1975); and *Atlantic Beach Casino, Inc. v. Morenzoni*, 749 F.Supp.. 38 (D.R.I. 1990)

Merits of *the Unreasonable Delay by FCC* Claim

Petitioner Forbes' inalienable constitutionally protected rights have suffered from *unreasonable delay by FCC* in response to egregious torts by both the AETN and KHOG defendants; injuries much greater to *vital* rights of natural persons, than harms to the fiscal interests of parties in *Telecommunications Research & Action Center v. FCC (TRAC)*, 750 F.2d 70 (App D.C., 1984):

"... [T]he statutory commitment of review of FCC action (*or inaction*) to the Court of Appeals, read in conjunction with the All Writs Act, 28 U.S.C. § 1651(a) (1982), affords this court jurisdiction over claims of unreasonable Commission delay ... Here, of course, there is no final order -- indeed, the lack of a final order is the very gravamen of the petitioner's complaint. This lack of finality, however, does not automatically preclude our jurisdiction. 27

"27. Although the finality doctrine does limit judicial action, it does not do so in a precise and inflexible way. As the Supreme Court has instructed in *Abbot Laboratories v. Gardener*, 387 U.S. 136, 149-50, 87 S.Ct. 1507, 1515-16, 18 L.Ed.2d 681 (1967), a federal court should apply the finality requirement in a 'flexible' and 'pragmatic' way. *See also PCHRG v. FDA*, 740 F.2d at 30. In *PCHRG* we found that the finality requirement does not preclude us from reviewing claims of unreasonable agency delay. *Id.* at 30-32."

{At n. 29 the D.C. Court of Appeals saw another danger in} unreasonable agency delay "... postponement of an unreasonable delay claim until after the agency's decision may render it moot and deprive the Court of Appeals of the opportunity to review the delay claim {Which is *precisely* what happened in Forbes' case; *e.g.*, App. 17a; 222a}, thus permitting present review under the All Writs Act."

"The Administrative Procedure Act ('APA') provides additional support for our jurisdiction here. The Act directs agencies to conclude matters presented to them '*within a reasonable time,*' 5 U.S.C. § 555(b) (1982), and stipulates that the 'reviewing court shall ... compel agency action unlawfully withheld or unreasonably delayed ....' 5 U.S.C. § 706(1) (1982) ... [S]ection 706(1) coupled with section 555(b) does indicate *a congressional view that agencies should act within reasonable time frames* and that *court's* (sic) *designated by statute to review agency actions may play an im-*

portant role in compelling agency action that has been improperly withheld or unreasonably delayed. See, e.g., PC-HRG v. FDA, 740 F.2d 21, 32 (D.C.Cir.1984)"
TRAC, 750 F.2d 70 at 76, 77, italics supp.; (App D.C., 1984)

" [11] As we have noted above, there is no doubt that this court has present jurisdiction to hear claims concerning nonfinal agency action (or inaction) that might affect our future statutory review of final agency action. ..." (*TRAC* at 79)

"[12] Claims of unreasonable agency delay clearly fall into that narrow class of interlocutory appeals from agency action over which we appropriately should exercise our jurisdiction. It is obvious that the benefits of agency expertise and creation of record will not be realized if the agency never takes action. Agency delay claims also meet Judge Leventhal's suggested criteria for our interlocutory intervention - not only is there an outright violation of 5 U.S.C. § 555(b)'s mandate that agencies decide matters in a reasonable time ... Finally and most significantly, *Congress has instructed statutory review courts to compel agency action that has been unreasonably delayed.* 5 U.S.C. § 706(1). 39

"39. In *Castle v. Pacific Legal Foundation*, the Supreme Court noted that judicial review of prolonged agency inaction may be obtained under this section of the APA. 445 U.S. 198, 220 n. 14, 100 S.Ct. 1095, 1108 n. 14, 63 L.Ed.2d 329 (1980)." (*TRAC* at 79)

"The time agencies take to make decisions must be governed by a 'rule of reason' ... the court should consider ... higher or competing priorit[ies, and] should also take into account the nature and extent of the interests prejudiced by delay."
(*TRAC* at 80); *cf.* App. 222a.

* * *

"In *MCI* we announced that:
'... the delay at issue here threatens the FCC's credibility ... Many of the same considerations that impel judicial protection of the right to a "speedy trial" in criminal cases or implementation of civil decrees with all deliberate speed are not inapposite in agency deliberations. Those situations generally involve protection of constit-

utional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires.' 627 F.2d at 340-41 (footnotes omitted)." *idem* at 80

TRAC, id. establishes: 1] lack of final order does not automatically preclude Court of Appeals jurisdiction under 28 USC § 1651 over claim that *FCC unreasonably delayed* in issuing order; 2] *court has present jurisdiction to hear claims* concerning nonfinal agency action *or inaction* that might affect future statutory review of final agency action; 3] claims of *unreasonable agency delay* fall into class of interlocutory appeals from agency action over which court exercises jurisdiction; and, 4] in light of failure to meet prior deadlines for proceedings, court retains jurisdiction. [9]

Forbes Exhausted Remedies Because *The FCC's Inaction Is Tantamount To A Final Order Of Denial*

The FCC's non-action in this case, while "negative in form" was "affirmative in substance." See *Alton R.R. v. United States*, 287 U.S. 229, 235, 53 S.Ct. 124, 126, 77 L.Ed. 275

This Court in *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 59 S.Ct. 754 (1939) declared:

"'Negative' has really been an obfuscating adjective in that it implied a search for a distinction - non-action as against action - which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability." *Rochester,* 307 U.S. at 141, 59 S.Ct. at 762

"... It seems capricious that the fact that the Commis-

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[9] *cf. Lehigh Portland Cement Co. v. Federal Trade Com.*, (1969, CA4) 416 F.2d 971; *Texas Petrochemicals Corp. v. NLRB*, (1991, CA5) 923 F.2d 398; *Cal-Almond, Inc. v. Yeutter*, (1991, ED Cal) 756 F.Supp. 1351; *cf. La Bonne v. Heckler*, (1983, DC Minn) 574 F.Supp.... 1016, dismissd without opp. (CA8 Minn) 732 F.2d 161 and later proceeding (DC Minn) 580 F.Supp. 558; *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp... 729 (ED NY, 1984) (App. 223a).

sion's order, authorized the preservation of the status quo should block any review at all ..." n. 26., *id.* at 141 & 763

* * *

[An inaction or delay of the Commission] "maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's [in]action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant cannons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and *should not control jurisdiction...*"

{Italics supplied by Circuit Judge FLAUM in *Maier v. F.C.C.*, 735 F.2d at 226 (1984) citing} *Rochester* at 142 & 763

"[5] The order of the Communications Commission in this case was therefore reviewable. It is not a mere abstract declaration regarding the status of the (paramount rights of the people to be informed, the rights of free expression and equal enforcements of the law of the petitioner) under the Communications Act, nor was it a stage in an incomplete process of administrative adjudication."

Rochester, 59 S.Ct. 764, 307 U.S. 143-144

(The FCC's inaction brought immediate and irreparable harm both to the public and to petitioner Forbes.)

The mere fact that the FCC fails or refuses to take action, as opposed to affirmatively taking action, does not exclude such inaction from judicial review.

See Maier v. F.C.C., 735 F.2d 220 at 226 (1984); And, *cf. n.* 6:

"Similarly, it is not the label given to an order of the Commission, but rather the substance of the order, that determines whether the order is reviewable. *CBS v. U.S.*, 316 U.S. 407, 416, 62 S.Ct. 1194, 1199, 86 L.Ed. 1563 (1942)."

Where administrative inaction is the equivalent of an order denying relief, *jurisdiction lies in the Court of Appeals.* *Environmental Defense Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098-99 (D.C.Cir. 1970)

And plaintiff has standing because agency *inaction* as well as action is cognizable under 5 USC §706.

Hardy v. Leonard, 377 F.Supp. 831 (1974, ND Cal)

"That the FCC's (stonewalling) here is not called an 'order' is of course no obstacle. (Even where *a letter* 'imposes no immediate obvious sanction,' it is a 'substantial cloud' that is at least 'some modicum of injury, some concrete effect;' *it is) enough to establish a present effect sufficient to make the letter a final order ripe for review on the petition ... United States v. Storer Broadcasting*, 351 U.S. 192, 76 S.Ct. 763, 100 L.Ed 1081 (1956), *CBS v. U.S.*, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed 1563 (1942)." {Italics supplied.} *Straus Communications, Inc. v. F.C.C.*, 530 F.2d at 1006-1007 (1976)

"This Court has said that '*to be final an order must "impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process ..."*'"

Illinois Citizens Cmte. for Broadcast v. F.C.C., 515 F.2d at 402; {Italics supplied.}

The FCC's foot dragging and refusals deny the rights asserted under the 1st, 5th & 14th Amendments and 47 USC §312 & §315: (1) relegating petitioner Forbes and all non-insider candidates to a class of non-persons with no recognizable, nor enforceable rights; and (2) reduces the public to mere insignificant chattel; the people are stripped of legal relevance, a *de facto* revocation of citizenship, an administrative declaratory judgment against status without due process.

The sovereign source of political and constitutional governance is utterly disregarded by those charged with preserving popular government by consent under law; [10]

Therefore, *FCC denials and inaction are final orders* within the meaning of 28 §USC 2342(1) (1970). (App. 27a).

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[10] If citizens are denied, by government countenance, information needed to cast informed ballots, are they not denied representative government? If they are then taxed, is that not violative of the XIIIth amendment?

Rigorously, when the FCC argued as amicus against Forbes and his complaint, *the FCC* de facto *and* de jure *made its decision* for the AETN and KHOG Defendants *against Forbes and his cause.*

"... The particular label placed upon it (an 'order') by the Commission is not necessarily conclusive, *for it is the substance of what the Commission has purported to do and has done which is decisive. Powell v. United States*, 300 U.S. 276, 284, 285, 57 S.Ct, 470, 474, 475, 81 L.Ed. 643; *A.F. of L. v. Labor Board*, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347. {Italics supp.} *CBS v. U.S.*, 316 U.S. at 416, 62 S.Ct. at 1200, 86 L.Ed 1563 (1942) [11]

The instant case is beyond a *threat* of irreparable injuries to *pecuniary* interests; irreparable injuries to far more precious stakes and rights have already been inflicted; and there exists the *certainty* that these wrongs will be perpetuated and expanded until liberty as entrusted to this Court by the Nation shall be mutilated beyond all recognition. The FCC inaction and misfeasance, *re* the violations by the K-HOG and AETN defendants, has abrogated inalienable, constitutional, statutory and regulatory rights.

There are no adequate administrative remedies. Petitioner Forbes requires remedial, declaratory, injunctive and equitable relief. Therefore, in this case: "because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control." (App. 233a, 234a).

CBS, 316 U.S. at 423, 62 S.Ct. at 1204, 86 L.Ed 1563

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[11] *CBS, id.*, is a case where allegations show a *threat* of irreparable injury to *a licensee's business*; this was *sufficient*, this Court said, to give standing for judicial review of FCC *non*-order ..." 316 U.S. 423, 62 S.Ct. 1203; *See also Western Pacific C.R. Co. v. Southern Pac. Co.*, 248 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160; *Clairborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808. (App. 224a).

FUTILITY

Although, as a general principal it is true that administrative remedies must be exhausted prior to seeking judicial relief; *Rodabaugh v. Sullivan*, 943 F.2d 855 (8th Cir. 1991); *Burkey v. Government Employees Hospital Association*, 983 F.2d 656 (5th Cir. 1993); this principle is not universally and invariably true. (App. 33a; 223a ~ 225a; 231a).

In general, *exhaustion of administrative remedies will not be required where the entire undertaking would be futile.*
Smith v. Robinson, 468 U.S. at 1014 n. 17, 104 S.Ct. at 3469 (1984); *Reiter v. Cooper*, ___ U.S.___, 113 S.Ct. 1213 (1993); *Honig v. Dole*, 108 S.Ct. at 606, 484 U.S. 305 (1988); *Brown v. U.S.*, 486 F.2d 658, 661 (8th Cir. 1973); *Means v. Wilson*, 522 F.2d 833 at 837 (8th Cir. 1975). (App. 60a; 62a; 126a; 136a; 148a; 175a; 178a; 183a; 199a, 200a).

The Circuit Opinion (page 4) notes the petitioner's claim that the FCC first advised him that his application was a "waste of time" and then failed to even send the necessary forms. Clearly, such circumstances, if true, relieve the petitioner of any further necessity of seeking futile administrative relief.
State of N.Y. v. Sullivan, 906 F.2d 910, 918 (2nd Cir. 1990).

Petitioner's position is akin to that of the plaintiff in which the 9th Circuit noted: Petitioner did not bypass the {"FCC"}. The {"FCC"} bypassed him. *Castillo-Villagra v. I.N.S.*, 972 F.2d 1017 at 1024 (9th Cir. 1992).

In a similar vein, this Court has held that a federal prisoner is not required to file a futile Administrative Petition with the Bureau of Prisons. *McCarthy v. Madigan*, ___ U.S. ___, 112 S.Ct. 1081, 117 L.Ed.2d 291 (1992).

Plaintiffs are not required to make pointless charges at administrative brick walls while important rights hang in the balance.
Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989)

THE FCC's ADMINISTRATIVE SCHEME IS INCOMPETENT TO PROTECT RIGHTS

While this Court has recognized a comprehensive statutory scheme in the Communication Act of 1934, *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed 656 (1940); petitioner respectfully shows:

1) At the hearing before the Eighth Circuit *en banc,* the defendants admitted *the FCC scheme can provide no remedy nor compensation for one who has been injured by the defendants;* (App. 90a, 91a; 105a; 110a; 125a~138a; 146a; 155a; 170a-184a; 200a~206a; 212a~214a; 223a; 228a~231a).

2) There is a world of difference between the question of constructing *electrical* transmission towers, which was at issue in Pottsville; and the *electoral* system which is at the heart and core of not only the First Amendment, but the bedrock foundation of this constitutional Republic, governed by the consent of a free people, who cast their ballots *based on free and open expression* in what they deem their own enlightened self interests; [12]

3) The FCC's *primary jurisdiction* is in matters which call for *technical knowledge and expertise;* its jurisdiction is *not* (and *cannot* be) in questions affecting constitutional power that have the effect of suppressing viewpoints and silencing "wide open, robust debate on issues of public importance."
Straus Communications, v. F.C.C., (1976) 530 F.2d 1007, n. 13.

It is clear that the congressional intent of APA and FCC administrative procedures (5 U.S.C. § 555; § 706; 47 U.S.C. § 402; *et seq.*) were intended to regulate *licensees* within the FCC's *primary purpose and jurisdiction.* (App. 169a; 232a, 233a).

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[12] Even in cases related to "the fundamental purpose," the *proper* and *legitimate* role of the FCC, *administrating licensees*, the Court has held: The people as a whole retain their interest in free speech by radio (and television) and their collective right to have the medium function consistently with the ends and purposes of the First Amendment: "... *The fundamental purpose of Congress* in respect of broadcasting *was the allocation and regulation of the use of radio frequencies* by prohibiting such use except under license ... *Plainly it is not the purpose of the Act to protect a licensee ... but to protect the public.*" (Italics supplied.)

Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 475; 60 S.Ct. 693, 697 (1940); *cf. FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 361-362, 75 S.Ct. 855 (1955)

And 4) the FCC in 1940 may have been the watchdog protecting the public's paramount rights, but it has long since metamorphosed into a silent lap dog that allows the privileged licensees to trespass and ravage the public's domain, while snarling at and attacking the rightful stewards of the land, the theoretically sovereign people. What big teeth Big Brother has; the wolf has replaced granny. [13]

First Amendment rights "must not, *in the guise of regulation,* be abridged or denied." *Hague v. CIO*, 307 U.S. 496, 516, 59 S.Ct. 954, 964, 83 L.Ed. 1423 (1939)

"Freedom of the press from governmental interference under the First Amendment does *not* sanction repression of that freedom by *private* interests." *Associated Press v.* U.S., 326 U.S. 1, 20; (App. 226, 227a).

Licensees are entrusted with *technological* control, *not the power of monopoly and censorship* to decide what politically permitted speech, viewpoints and ideas may be broadcast.

They are specifically, *expressly enjoined from censoring* and unlawful discrimination; and they are positively mandated and *required* to provide the public with a full, unrestricted expanse of ideas and viewpoints. Freedom of expression is indivisible from the Republic *with Liberty and Justice for all;* it has always been the law of the land "whereof the memory of man runneth not back to the contrary."

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[13] In the Opinion at 13a, Judge McMillian states in dissent: "It may be true that the FCC is not as vigilant or as sensitive to first amendment issues as it should be." This is classic understatement; on its face it should trigger the judicial power to aroused vigilance. This Supreme Court has recognized the need for vigilance in the face of governmental regulation.

e.g., Red Lion, supra, 395 U.S. at 390. *cf., LWV*, 468 U.S. at 402, 403, 417, 104 S.Ct. at 3129, 3132, 3136; (App. 89a, 90a; 98a; 123a; 130a, 131a; 160a; 165a; 171a; 185a; 188a; 212a; 228a; 234a, 235a).

It profanes the First Amendment to mask blatant censorship behind obscene oxymorons and shameless shams, such as "*exercising first amendment duties.*" It is a wicked perversion of the intent, letter and spirit of the law to say that § 315 gives the licensee *under color of governmental rule* sanction to infringe, insult, assault, abridge and abrogate freedom of speech, (and) the right of the people ... to petition the government for a redress of grievances;" and, to deprive persons of liberty, or property, without due process of law; and to deny persons the equal protection of the laws. It "would be laughable were it not so Orwellian ..." *LWV, id.*, n. 10 at 417 & 3136.

"But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis."
NBC v. U.S., 319 U.S. at 226, 63 S.Ct. at 1014 (1943)

This strange symbiotic relationship, in which the FCC regulates the people in the interests of the licensees, rather than protecting the people by requiring the permittees to obey the law, is a case of the tail wagging the dog. On its face, the intolerable record in this case, the blatant suppression of candidate expression in 100% of the innumerable cases that come before it *every* election cycle, *the FCC provides no adequate remedy to vindicate the rights claimed.* (App. 69a; 89a; 233a, 234a). [14]

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[14] **The FCC has no credibility to be entrusted with First Amendment trust because *it has broken faith with this Court;*** and usurped powers to use interpretations of its own promulgations to overturn: its own rules; statutes enacted by legislature; *an entire progeny of cases carefully crafted by this high Court;* and overthrown the Constitution and abrogated the Bill of Rights as more fully shown at App. 84a and *passim*.

And if once upon a time there were provisions and procedures for administering the *FCC-throttled* Fairness Doctrine, which seemed to provide adequate *speedy* remedy *with timely judicial review* for the public to address the thorny issues of equity and enforcement, *and even provided* **for *private* parties *to vindicate the public interest*** (*e.g.*, *Illinois Citizens Committee for Broadcast v. F.C.C.*, 515 F.2d 397; *Maier v. FCC*, 735 F.2d at 228-9); **today there exists *no adequate remedy under administrative law* to vindicate the public's paramount rights; nor the fundamental rights of candidates in the petitioner's position.** The fairness doctrine impose(d) two duties on broadcaster: (1) it must present coverage of issues of public importance, and (2) such programming must fairly reflect differing viewpoints on controversial issues. *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 111, 93 S.Ct. 2080, 36 L.Ed.2d 772 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 377, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969). ... *e.g., see* App. 186a.

(The FCC's) "decisions (*were*) in accord with this court's general command that 'the *essential* basis for any fairness doctrine ... is that *the American Public must not be left uninformed.' Green v. FCC*, 144 U.S.App.-D.C. 353, 359, 447 F.2d 323, 329 (1971) (emphasis in original) ..."
Public Media Center v. F.C.C., 587 F.2d 1322 at 1328 (1978)

However, even though Congress "ratified [the fairness doctrine] with positive legislation" *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 380-82, 89 S.Ct. at 1801-1802 (cited n.4, *Maier v. FCC*, 735 F.2d at 225); *the FCC unilaterally revoked this congressional and judicial approved doctrine* and has provided *nothing* to replace it to implement the FCC's statutory duty.

Please see App. 84a~94a; 189a~192a.

"Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body. ... Congress has charged the courts with the responsibility of saying whether the Commission has fairly exercised its discretion within the vagueish, penumbral bounds expressed by the standards of 'public interest.' It is our responsibility to say whether the Commission has been guided by proper considerations in bringing the deposit of its experience, the disciplined feel of the expert, to bear on applications for licenses in the public interest."

Federal Communications Com'n v. RCA Communications (RCA), 73 S.Ct. 998 at 1002, 346 U.S. 86 at 90, 91 (1953)

The courts have provided judicial relief in spite of administrative remedies in many lesser areas. Title 47 § 312 and § 315 are not merely some numbers in a bureaucratic alphabet soup, they are an attempt to protect [a] the paramount rights of the people to be informed; and [b] the rights of individual citizens to be secured by the 1st and 14th Amendments against the awesome powers delegated to privileged caretakers of the public's airwaves. [15] The FCC was created to regulate the licensees in the interests of the people, and for many years it apparently did its job well. But in recent years there appears to have been an Orwellian transmogrification so that Citizens' rights are violated, individually and collectively, by licensees; but the Citizens are denied their right to vindication in a court of law, and told they must apply pointlessly to a bureaucracy that cannot and will not redress their grievances. The First Amendment guarantees the people their right to petition our government. In this instance, the limited, restricted "right" to petition the FCC is a hollow, futile mockery.

Congress has imposed on broadcasters the obligation to "operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance." *(47 USC 315)*. "The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States." *NBC*, 319 U.S. at 217, 63 S.Ct. at 1011.

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15 The Courts have held a licensed broadcaster is "granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations." *Office of Comm. of United Church of Christ v. FCC*, 707 F.2d 1413 (1983); *cf., Munn v. Illinois*, 94 S.Ct. 113 (1876); (App. 101a ~ 104a).

"Similarly, in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 98 S.Ct. 2096, 56 L.Ed.2d 697 (1978), we deemed the policy of promoting the widest possible dissemination of information from diverse sources to be consistent with both the public-interest standard and the First Amendment, *id.*, at 795, 98 S.Ct., at 2112..."

FCC v. *WNCN Listeners Guild*, 101 S.Ct. 1266 at 1274, 450 U.S. 582 at 594, 67 L.Ed.2d 521 (1981) (App. 103a).

* * *

The FCC is incompetent in law and in fact to administer the fundamental, inalienable rights of the public and of the candidate exercising his right to express his views in the political market place; other than exerting its *only* constitutional and congressionally authorized power to say unto the *licensees:* **Thou shalt *not* censor!** *Thou shalt not discriminate!*

It is *prima facie* unreasonable and constitutionally repugnant to require petitioner to "exhaust" so-called administrative "remedies," to run a bureaucratic gantlet as the price he must first pay as the toll to the courthouse door to evoke his constitutionally protected rights to remedy and redress at law. No American should be condemned to the Sisyphean fate of eternally rolling boulders up *Mt. Hopeless* in the FCC's bureaucratic version of hades, as an administrative exaction for claiming inalienable, unabridgeable rights. (App. 89a).

The FCC may well be the appropriate body to resolve matters of communication policy and regulate licensees;

But the courts are the appropriate forums for resolving matters of communications law that abridge speech.

PETITIONER HAS RIGHT TO ACTION

Simply stated, a private cause of action arises for political candidates and ballot initiative petitioners under 47 USC § 315 (a) because this portion of the Communication Act of 1934 is *sui generis*. There is simply nothing else like it. Elections and referenda are at the core of the American political experience. All principal government officials, including the Justices of this honorable Court, take oath to uphold and defend this form of free, representative republican form of government by virtue of Article VI of the supreme Contract. While the courts

have historically refrained from deciding purely political issues, the ultimate reference point of any such inquiry is, of course, the Constitution. "The mere fact that a suit seeks protection of a political right does not mean it is ... non-justiciable."

Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663

"The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity *essential to the security of the Republic,* is a fundamental principle of our constitutional system."

Stromberg v. California, 283 U.S. 359, 369, 51 S.Ct. 532, 536, 75 L.Ed. 1117 (1931).

Article IV, Section 4 of the Constitution is unique in that it not only contains a grant of power from the People through the States, but an injunction. It not only permits, *it commands.* Specifically, it commands the federal government to maintain a republican form of government for each state. It is one of the rare instances in which the federal government sins by omission. This is significant because it dramatically illustrates the unique character which elections and referenda, popular republican representative government, meant to the framers. It goes without saying that federal elections, though not specifically referred to, are of no less interest. Secondly, the Communications Act of 1934, as a whole deals with a subject of transcendent importance. The mass media, particularly television, has exponentially increased the power for the dissemination of good and ill. For these reasons; because the Act deals with broadcasting generally, and because §315(a) regulates broadcasting activity in that field which is central to a democracy, free and open elections and referenda, this particular statutory provision is unique and without parallel. Elections, won or lost, can change the course of national history. Referenda can alter the direction of an entire people. For this reason, it necessarily follows: that, whatever the appropriate rule with respect to the remainder of the Act; *§315(a) permits and creates a direct private right of action,* irrespective of any ancillary avenues of relief by administrative action by the FCC.

Nor has this Court been slow to recognize such private rights in other areas, which though important, do not have

the compelling power of this subject. (App. 228a; 232a).

Thus, it is consistent with the nature, purpose and character of the Communications Act of 1934, and more specifically with §315(a) to permit the institution of a private rights action with respect to the critical areas of elections and referenda. (App. 229a).

INCONSISTENCY WITHIN CIRCUIT

The Circuit Court of Appeals rightly decided that Petitioner was not required to exhaust FCC's alleged remedies in regards to AETN's violations of rights protected by the First Amendment. But it is inconsistent to require petitioner to go through the motions of exhausting FCC "remedies" before proceeding against the KHOG defendants when the 1992 election is long over; and, in the words of the Eighth Circuit Court, "it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning." (App. 17a).

Denying petitioner his day in court by compelling him to first exhaust his *nonexistent* FCC remedies is inconsistent with the Eighth Circuit's own case law, decisions of other circuits, as well as *stare decisis* of this Court, as more fully shown in the Appendix at 100a, 101a; 126a~130a; 138a; 171a, 172a; 202a, 203a.

PETITIONER HAS RIGHT TO ACTION UNDER 42 USC § 1983 & § 1985

The Court of Appeals holding that the District Court was correct in saying that the Plaintiff failed to state a cause of action, manifestly, is incorrect. *e.g.*, App. 116 ~ 117a; 124a; 128a; 133 ~ 134a; 138a; 200a; 205a and *passim*..

It is important to note that the Court is required, for purposes of Rule 12, to accept all pled allegations as true.

Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976);

On appeal from judgment granting a motion to dismiss the complaint in an action to enjoin enforcement of an order of the FCC, allegations of the complaint must be accepted as true.

CBS v. U.S., 316 U.S. at 414, 62 S.Ct. at 1199 (1942)

It is difficult to imagine more explicit allegations of conspiracy to deny voting rights under 42 USC §§ 1983, 1985. *e.g.*,

App. 70a; ¶¶1~9 of Complaint, 74a, 75a; 142a; 210a; 214a.

In respect both to sufficiency and unambiguity of statute, Forbes' case is virtually identical to pleadings this Court ruled on January 24, 1994 in *National Organization For Women v. Scheidler*, No. 92-780: 508 U.S. ___ (1993):

¶5: "We have held that '[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.' ... The District Court dismissed petitioners' claim at the pleading stage pursuant to Federal Rule of Civil Procedure 12(b)(6), so their complaint must be sustained if relief could be granted 'under any set of facts that could be proved consistent with the allegations.' ... {It was enough that:} DWHO and SWHO *alleged in their complaint that the respondents conspired . . .*"

¶6: "***Nothing more is needed to confer standing*** on {Forbes} **at the pleading stage.**"

¶11: "We believe *the statutory language is unambiguous,* and find in the parties' submissions respecting legislative history no such 'clearly expressed legislative intent to the contrary' that would warrant a different construction..."

¶12: " '{T}he fact that {statute} has been *applied in situations not expressly anticipated by Congress does not demonstrate ambiguity, it demonstrates breadth.' ...*" {Emphasis added; citations omitted.} (App. 128a, 133a~138a, 201a~209).

Thus, the petitioner has not only met the pleading burden for purposes of Rule 12 as to his §§ 1983/5 claims in one instance, he has met them with respect to at least three separate and distinct portions of the unambiguous language of the statutes.

Clearly, (§1983) is to be broadly construed; *Dennis v. Higgins*, 498 U.S. 439, 111 S.Ct. 865, 112 L.Ed.2d 969 (1991).

The Court explained the purpose of the Act in *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984):

"The goals of the federal statutes are compensation of persons whose civil rights have been violated and prevention of the abuse of state power." *idem*, 468 at 53, 104 S.Ct. at 2931.

Petitioner claims his rights were violated by abuse of state

power and demands compensation which the FCC is impotent to provide. Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. *Felder v. Casey*, 487 U.S. 131, 139; 108 S.Ct. 2302, 2307; 101 L.Ed.2d 123 (1988) (App. 32a & 34a; 128a).

Thus, petitioner would assert that; even if there is no general right to seek judicial redress against violations of §315(a); nonetheless that action still is maintained against those, who act under "color of law." Indisputably, this Court has upheld the Circuit Court's substantive holding that the AETN actors are Defendants; AETN claims their actions were under color of law. Because of the particularly egregious character of violations of §1983 and because of the inability and unwillingness of administrative agencies to deal with the same, a judicial cause of action should be recognized by this Court.

Petitioner would direct the Court's attention to its decision in *Golden State Transit Corporation v. City of Los Angeles*, 493 U.S. 103, 110 S.Ct. 444, 107 L.Ed.2d 420 (1989) (*Golden State II*) in which the Court recognized an action for damages under §1983 against respondent city which violated federal law (N.L.R.A.) by conditioning renewal of a taxicab franchise upon settlement of a pending labor dispute. *The availability of administrative mechanisms to protect a plaintiff's interest is not necessarily sufficient to demonstrate that Congress intended to foreclose a §1983 remedy. Golden State II*, 493 U.S. at 106, 110 S.Ct. at 448, 449. The City did not argue, nor could it, that a §1983 action is precluded by the existence of a comprehensive enforcement scheme. Although the National Labor relations Board (NLRB) has exclusive jurisdiction to prevent and remedy unfair labor practices by employers and unions, it has no authority to address conduct protected by the NLRA against government interference.

Golden State II, 493 U.S. at 108, 110 S.Ct. at 450

Clearly, §1983 was intended to address the very kind of egregious governmental high-handedness and deprivation of rights evidenced in this case by defendants. Under these circumstances, a private right of action should be recognized.

(App. 125a~133a, 134a~137a; 175a; 229~232a).

"*We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of federally secured right.*" {Italics supplied}

Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 at 422, 107 S.Ct. 766 at 770 93 L.Ed.2d 781, (1987); Citing *Smith v. Robinson*, 468 U.S. 992 at 1012, 104 S.Ct. 3457 at 3468, 82 L.Ed.2d 746 (1984).

There are a plethora of cases (*e.g.*, 230a~232a), where exhaustion or remedial schemes did not bar actions under § 1983, in virtually every circuit. (App. 125a~137a; 146a~150a; 184a).

It is utterly irrelevant what the district court thinks the chances of the plaintiff might be of ultimately prevailing. That is a matter for proof at trial. Clearly, the district and circuit court were wrong with respect to §§1983 & 1985 of 42 USC. The petitioner should be and must be given his lawful date to measure his allegations against the requirements of the code. (App. 113a~126a).

* * *

Petitioner respectfully implores the Court to mark that the great import here is far beyond your petitioner *per se*'s right to speech, to equal protections, or to preserve his day in court: but of vital, supreme paramountcy is; if these rights can be taken from *any* one, they can be taken from *anyone*.

At all times, at every stage in this case, petitioner has raised the Constitution's trenchant commands as his banner and shield (*e.g.*, 160a, 234a). Is he required to turn to the FCC to vindicate his constitutionally protected rights? [16]

The FCC admits *every* election there is a large number of candidates who complain of being excluded by licensees. But of this class of candidates, petitioner is *the only one* whoever overcame the hurdles to bring this pernicious practice to the court's purview. (App. 69a; 89a; 93a; 175a; 233a, 234a).

The *real, vital* issues underlying this case are apprehended in these corollary questions:

- I -

Whether Congress, or any creation thereof, may [A] com-

[16] "... The very simple answer to that position {that the courts defer to the Commission on constitutional questions} is that *FCC regulation is designed neither to preempt judicial scrutiny nor to redress state censorship ...*" *Muir*, at 1056 (App. 89a); *Allentown & RCA*, *supra*, at 7 & 21.

pel a Citizen to *de facto* and *de jure* surrender rights expressly secured by the Constitution of the United States, under color of any statute, ordinance, regulation, custom or usage?

Or, [B] whether Congress, or any agency of government, may confer such alleged, usurped powers to others to deprive any person, class of persons - or the people as a whole - of rights, privileges or immunities secured by the Constitution and/or laws, enacted pursuant to the Constitution?

- II -

Whether [A] we the people of the United States still enjoy a constitutional Republic under law in which the representatives of the people are elected in a free and open society, *predicated upon an electorate with a bedrock right to be informed,* so that they may cast ballots based on informed consent and enlightened self interest; a government which declares the Constitution is yet the supreme law of the Land?

Or, [B] is the Republic being inexorably replaced by a totalitarian, Orwellian oligarchy, in which doublespeak procrustean, inverted interpretations of regulations overturn rules; and rules annul statutes; and this so-called "law" overthrows the Constitution? Whence all these strange convolutions and perversions of two centuries of proven principles? "Upon what meat doth this our Caesar feed, that he is grown so great?"

Why is it that state officials and *state-sanctioned, state-vested-private-actors,* as in this case, can now "legally" deny the People "information, or the means of acquiring it"?

Can all this, in Madison's words, lead to anything "but *a Prologue to a Farce or a Tragedy; or, perhaps both*" ?

- III -

After Watergate where is one courageous congressman or politician, much less a majority, who will stand in the gap to check abuse by the *nomenklatura*, an elitist, quasi-state media monopoly with unchecked power to censor, distort or fabricate popular information *to manipulate and control the people and government?* The calm, deliberations, the "advice and consent of the senate" the framers meant for the president {Article II, Sect. 2} has been reduced to disgraceful spectacles, legal lynchings; a *post*-republic, imperial carnival in

which the character of jurists, educators, healers, ordinary citizens, heroes or saints may be thrown, *gagged and silenced,* to the lions of the mass media; to be assassinated for sport or special interest. In the seat of the emperor, unchecked to turn thumb's down on their victim in the political-pogrom-of-the-hour, sits the elite of the fourth estate, protected and empowered by their sycophant Praetorian Guard, *the FCC.* (App. 163a ~ 165a).

Did not the framers make the Justices immune from the vagaries of politics and pelf so that the Courts would be the aegis, the shields, the defenders of the People's rights in the days of such unbridled abuse? (Article III, §1).

e.g., ex parte Milligan, 4 Wall 2 (1866) (App. 106a).

Unless this rapid erosion of our fundamental rights is reversed, will we not come to the place where purported "law" is the absolute sovereignty of the state over individual rights and interests; buttressed by a virtual *Ministry of Truth*, an imperial bureaucracy serving the interests of a tiny elite of privileged, *private* special interests, protected and empowered by *state* officials: *a literal,* by definition, *corporate-state-fascism (Lutto v. Field),* a "politically correct," Orwellian-thought-police, that effectively decides 99.9% of what the American people shall be permitted *or denied* the right to hear, to know ... and ultimately decreeing what we must *not*-speak, *non*speak, *new*speak; "think," *un*think, *new*think, *non*think and *double not-think!*? (App. 50a; 57a; 101a; 153a; 159a; 192a).

To evade resolving the underlying constitutional questions, to view this case as mere hair splitting of technical niceties, rather than an opportunity to remedy a deadly threat to our free constitutional Republic under law, is to strain at gnats while swallowing camels, to exalt form over substance, *"to suffer tamely a lawless attack upon our liberty."* (App. 98a, 235a). [17]

---

[17] "... [T]his Court cannot and should not assume any exemption *when duty requires it to decide a case in conformance with the Constitution.* A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that." [Italics added.]

Planned Parenthood v. Casey, 112 S.Ct. at 2815-16 (1992); *cf.*, *CBS. v. DNC*, 93 S.Ct. 2087; 412 U.S. at 103; (App. 89a; 108a; 131a; 172a; 175a; 224a; 232a).

Nor is there any doubt as to the ability of this Court to grant plenary relief as demanded by the circumstances. *Franklin v. Gwinnett County Public Schools*, __ U.S. __, 112 S.Ct. 1028 (1992); (App. 127a, 128a; 175a; 229a).

"A popular Government, *without popular information, or the means of acquiring it,* is but a Prologue to a Farce or a Tragedy; or, perhaps both." James Madison, Chief Author of The Bill of Rights and The First Amendment.

CONCLUSION

This Court should reaffirm the paramount First Amendment Rights of the People, because they are preservative of all rights; and the rights of the individual candidates are so overriding, *juris et de jure*, for the vital interests of maintaining constitutional government that the FCC must forthwith comport its procedures and rulings with the clear letter and spirit of § 312 and § 315 of Title 47 in favor of the originally intended free and equal access, with a clear directive that if FCC cannot rule with finality in a *timely* and lawful manner, the presumption must be in favor of any candidate to be given equal opportunity to present his or her views.

And, that a Citizen, who has been harmed or deprived of the basic rights these statutes were enacted to preserve, such as a candidate whose ads are censored, is entitled to remedy at law without the burden of first submitting to endless, useless, idle rituals of pointless futility before the injured party may exercise his express rights to seek justice in an action at law, suit in equity, or other proper proceeding for redress.

And, the people, whose paramount rights are violated, are entitled to redress; or at least to be protected by requiring the FCC to immediately suspend the license for probable cause of any broadcaster that censors a political ad and/or abuses an exemption to suppress candidates and viewpoints, under penalty of permanent revocation and exemplary fines.

And, in particular, the petitioner, under the especial set of facts in this matter, is entitled to go to trial with his case against the defendants forthwith, or as soon as may be practicable with no clock of limitations tolling against him.

And, such other relief as this honorable Court may deem just and proper.

May God, Who is Just, have Mercy upon this Honorable Court and upon this Nation.

Respectfully submitted,
Ralph P. Forbes
Petitioner in his own proper person

Supreme Court, U.S.
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Supreme Court, U.S.
FILED
SEP 19 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

APPENDICES - I

Ralph P. Forbes,
Citizen In His Own Proper Person
Box 88
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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WA

Ralph P. Forbes, and the People, *Appellant,*

v.

Arkansas Educational Television Communications Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager;

On Appeal from the United States District Court for the Western District of Arkansas

Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does; KHBS TV/Channel 40 UHF; KHOG TV/Channel 29 UHF; American Broadcasting Company; Darrel Cunningham, in his individual capacity,
Appellees. ⊥2 *

Submitted: August 31, 1993

Filed: April 28, 1994

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, BEAM, LOKEN, HANSEN, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

RICHARD S. ARNOLD, Chief Judge.

The petitioner, Ralph Forbes, appeals the District court's dismissal of his complaint for failure to state a claim upon which relief can be granted. Forbes raises two issues. First, does a private television station violate the Federal Communications Act by deciding to air a political advertisement during "safe harbor" hours without first determining whether that ad is "indecent"? Second, does a political candidate who has qualified to be on the ballot have a right to be included in a debate sponsored by a public television station or, in the alternative, a right to equal access under 47 U.S.C. § 315,[1] when the other candidates are ⊥3 included? Relying on this Court's holding in *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), the District Court concluded that neither claim had merit, that the Communications Act cannot be enforced through a § 1983 action, and that Forbes had failed to state a claim under 42 U.S.C. § 1981, § 1985, or the First and Fourteenth Amendments. We now affirm in part and reverse in part.

I.

In 1992, Ralph Forbes was an independent candidate for United States Representative for the Third congressional District of Arkansas. He had obtained enough signatures to qualify for the ballot under state law. One of the defendants, the Arkansas Educational Television Network (AETN), is an instrumentality of the State of Arkansas. The other defendants are private television stations that broadcast in the Third congressional District.

A few weeks before the general election on November 3, 1992, Forbes sued AETN and its agents (collectively the AETN defendants) alleging that AETN planned to sponsor a debate among the candidates for the Third congressional District seat, but that it intended to include only the two major-party candidates. Forbes alleged that since he had qualified for the ballot as an independent candidate, he had a right to be included in the debate or, in the alternative, a right to additional air time on AETN to express his views, as required by the equal-time provision of 47 U.S.C. § 315. He claimed that AETN had denied him access to air time because of his

---

1 47 U.S.C. § 315(a) provides that any person legally qualified as a candidate for public office shall be afforded the same opportunities as all other candidates for that office. However,

> No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --
>
> (1) bona fide newscast,
> (2) bona fide news interview,
> (3) bona fide news documentary . . . or
> (4) on-the-spot coverage of bona fide news events . . .
>
> shall not be deemed to be use of a broadcasting station within the meaning of this subsection.

47 U.S.C. § 315(a).

political beliefs. Forbes also alleged that AETN's actions were taken in violation of 42 U.S.C. § 1981 *et seq.*; and that his First Amendment rights had been violated. Finally, Forbes alleged that his exclusion from the debates had deprived "the people" of their right to vote, and he sought declaratory and injunctive relief as well as compensatory and punitive damages.

Forbes alleged that he asked AETN to include him in the debate ⊥4 or give him additional time, and that his request was refused. He then telephoned the Federal Communications Commission and claimed that an FCC representative told him to "go through the motions" of a proper complaint, although it would be a waste of time. Believing that pursuit of his claim through the FCC would be pointless, Forbes wrote the FCC to request that his complaint be denied speedily so that he could seek an injunction in court. Instead, the FCC responded with a letter enclosing a statement of applicable law as well as instructions on how to file a complaint with the FCC. Forbes claims that he never received the enclosed materials, although he acknowledges receipt of the letter.

Forbes then sought injunctive relief in the District Court and moved for a preliminary injunction to mandate his inclusion in the debate. He alleged that AETN's reasons for excluding him from the debate were discriminatory and were specifically designed to keep the public from learning of Forbes's views on certain policy issues. In support of this position, Forbes claimed that an official of AETN stated that the network would run "St. Elsewhere" rather than a debate that included Forbes, and that another official of AETN stated that Forbes had not been included because he was not a "serious" candidate.

The District Court denied the request for injunctive relief on October 20, 1992. On October 21, 1992, sitting as a single circuit judge, the writer of this opinion denied Forbes's request for an injunction pending appeal. The next day, a panel of this Court declined to disturb that action. The basis for both rulings - that of the panel and that of the single judge - was that *DeYoung v. Patten, supra,* was controlling Circuit precedent and directly in point against Forbes.

On November 2, one day before the election, Forbes amended his complaint to include private television stations KHBS-TV and KHOG-TV, the American Broadcasting Company, and their agent, Darrel ⊥5 Cunningham (collectively "the private stations"), as defendants. In his amended complaint, Forbes alleged that the private stations had violated the provisions of the Communications Act by refusing to air one of his anti-abortion advertisements except during the "safe-harbor" hours of 11:00 p.m. to 6:00 a.m. without first making a determination that the ad was indecent. Forbes alleged a criminal conspiracy, "RICO treble damages," and violations of 42 U.S.C. § 1981 *et seq.*, and claimed the private stations' actions also were in violation of 47 U.S.C. § 315. He renewed his claims against the AETN defendants.

The AETN defendants filed a Rule 12(b)(6) motion, arguing that Forbes had no First or Fourteenth Amendment right to appear in a television debate, that he had no personal claim or cause of action under 47 U.S.C. § 315 to appear on television, that he failed to state a claim under 42 U.S.C. § 1981, and that he failed to state a cause of action against the AETN defendants. The private stations also moved for dismissal under Rule 12(b) (6), arguing that the District Court had no subject-matter jurisdiction under the Communications Act, and that Forbes had failed to exhaust his administrative remedies. The District court, after properly setting forth the standard for granting a Rule 12(b) (6) motion, concluded that the standard had been met by both sets of defendants. It concluded, following this Court's holding in *DeYoung v. Patten, supra,* that Forbes had no right of access to the public airways, that no implied right of action exists under the Communications Act; and that § 1983 cannot be used to enforce the rights granted by 47 U.S.C. § 315. Additionally, the Court concluded that the complaint contained only vague allegations of conspiracy that failed to state a claim under 42 U.S.C. § 1985. ⊥6

II.

In reviewing a dismissal for failure to state a claim, we take the allegations well pleaded in the complaint as true. Motions to dismiss should not be granted unless it is clear beyond

doubt that there is no set of facts the plaintiff could prove that would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Forbes has raised three claims in his complaint. First, as against both the AETN defendants and the private stations, Forbes has claimed violations of 47 U.S.C. § 315 and a conspiracy under 42 U.S.C. § 1985. Second, Forbes has additionally claimed against AETN a § 1983 violation for failing to provide him with equal time as required by § 315. Finally, Forbes has alleged that AETN violated the First and Fourteenth Amendments by failing to include him in the debate.

A. Statutory Claims

First, with respect to Forbes's statutory claim, we agree with the District Court and the private stations that Forbes's complaint cannot stand. There is no private cause of action to enforce 47 U.S.C. § 315, and Forbes's proper course of action is to bring his claim before the Federal Communications Commission. Forbes failed to exhaust his administrative remedies; therefore, his claim that the private stations improperly refused to run his anti-abortion advertisement outside of safe-harbor hours was not properly before the District Court. Additionally, Forbes's claim that AETN improperly refused to grant him equal time, as required by § 315, likewise should have been brought before the FCC first and then appealed, if necessary, to a court of competent jurisdiction. See *DeYoung*, 898 F.2d at 633-35. (We adhere to this aspect of *DeYoung*.) Since Forbes has failed to exhaust his administrative remedies, the District Court was correct in declining to rule on his statutory claims. [7]

We further agree with the District Court that there is insufficient substance to Forbes's conspiracy claim to entitle him to relief under 42 U.S.C. § 1985. We also affirm the District Court's ruling that the failure to allege racial discrimination bars his claim under § 1981. Finally, we agree with the District Court that § 1983 is not available to enforce Forbes's claims under § 315 of the Communications Act, since that provision itself contains the remedy for its violation - a petition to the FCC. Nonetheless, we disagree with the District Court with regard to Forbes's constitutional claims, and now hold that

Forbes did allege a First Amendment violation well enough to survive a motion to dismiss. We now turn to this claim.

B. First Amendment Claim

The District court dismissed Forbes's First Amendment claim on the authority of this court's holding in *DeYoung*, 898 F.2d 632, that "(a) political candidate does not have a 'constitutional right of broadcast access to air his views.'" *Id.* at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. Cir. 1980). The Court concluded that the only claim Forbes had to warrant his inclusion in the debate was under the equal-time provision of the Communications Act. Since there was no private right of action under the Communications Act, nor was § 1983 available to enforce its provisions, Forbes's only remedy was through the FCC. Letter from the District court to All Counsel of Record at 4, citing *DeYoung*, 898 F.2d at 634.

Generally speaking, it is true that a candidate does not have the right to demand air time. See *Kennedy for President Comm., supra.*[2] Under the circumstances of the present case, we hold that ⊥[8] Forbes did have a qualified right of access created by AETN's sponsorship of a debate, and that AETN must have a legitimate reason to exclude him strong enough

---

[2]In *Kennedy*, the FCC had denied a candidate's request for an opportunity to respond to the President's statements in a press conference. Since the press conference was a bona fide news event, and, therefore, the equal-time provision of the Communications Act was not triggered, the candidate argued that he had a First Amendment right to respond. The Court concluded that since there was no absolute right of access to the airwaves, the provisions of § 315 excluding bona fide news events from its requirements was not in violation of the First Amendment. *Kennedy*, 636 F.2d at 432. As a general rule, we agree with this principle - there is no First Amendment right to appear on television upon demand. However, the stations involved in *Kennedy* were private stations. See *Id.* at 419-20. In the present case, the fact that AETN is a public station and did, Forbes alleges, sponsor its own debate alters the analysis significantly.

to survive First Amendment scrutiny. In *DeYoung*, this Court concluded that a public television station, such as AETN, was a state actor. *DeYoung*, 898 F.2d at 631-32. We adhere to this conclusion. AETN is not a private entity; it is a state-owned television network; therefore, actions taken by the station, as well as actions taken by its employees and representatives, are fairly attributable to the State and subject to the Fourteenth Amendment, unlike the actions of privately owned broadcast licensees.

As a state actor, AETN is faced with constraints not shared by other television stations. When it comes to the First Amendment claim, we conclude that *DeYoung* was wrongly decided. *DeYoung* holds that no First Amendment right to appear in a televised debate exists, at least beyond that given by § 315, *DeYoung*, 898 F.2d at 633-35, and that the only remedy available to a candidate in Mr. Forbes's position is to seek remedial action through the FCC. This holding would allow a state-owned station to exclude all Republicans, or all Methodists, or all candidates with a certain point of view, except to the extent, if any, [3] that the excluded ⊥9 candidates could obtain relief under the Communications Act. We believe the error of such a proposition is self-evident. The state may not, by statute or otherwise, take such a discriminatory action, absent a compelling state interest.

The AETN defendants suggest that the case should be governed by public-forum analysis. If it is, the same conclusion follows: a state agency does not have an absolute right to determine which of the legally qualified candidates for a public office it will put on the air. The reason for such an exclusion must be ascertained and measured against First Amendment standards.

---

[3] Regardless of the sponsor, the FCC has allowed non-inclusive debates to be broadcast over public stations. See *In re Sagan*, 1 FCC Rcd 10 (1986). The deference we give administrative agencies on questions of statutory interpretation does not extend to constitutional issues. See *Chandler v. Georgia Public Telecommunications Comm'n*, 917 F.2d 486, 492 n.4 (Clark, J., dissenting), *cert. denied*, 112 S.Ct. 71 (1991).

In its discussions of public versus nonpublic fora, the Supreme Court has divided government property into roughly three categories. The first is the traditional public forum, such as the town square, "which by long tradition or by government fiat ha[s] been devoted to assembly and debate." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Public television stations do not fit into this category - there is no unlimited right of access to the airwaves. The second category is the limited public forum, a place that generally is not open for public expression, but that the government has opened for use for free speech for only a limited period of time, *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 655 (1981), a limited topic, or a limited class of speakers. See *Widmar v. Vincent*, 454 U.S. 263, 267 (1981). Since the key determination of whether a forum is a limited public one is the government's acquiescence in its use for expressive purposes, it is certainly possible that AETN created a limited public forum when it chose to sponsor a debate among the candidates for the Third Congressional seat. This is a determination the factfinder would have to make after carefully looking at the nature of the debate ⊥10 forum. If it were determined that AETN had created a limited public forum, then Forbes would have a First Amendment right to participate in the debate and could be excluded only if AETN had a sufficient government interest. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry*, 460 U.S. at 45.

The third category of governmental property is the nonpublic forum, which consists of property not usually compatible with expressive activity. See *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788 (1985). Even in the context of the nonpublic forum certain minimum First Amendment requirements apply:

> Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral. Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he

> is not a member of the class of speakers for whose especial benefit the forum was created, the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.

Id. at 806 (citations omitted). Since Forbes was a member of the class of speakers for whose benefit the debate was held (candidates for the Third congressional seat), and he wished to address the topic encompassed by the debate (who should be elected to Congress), if AETN failed to include Forbes because of objections to his viewpoint, it has violated his First Amendment rights. [4] See ⊥11 *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361 (8th Cir. 1988) (while there is no First Amendment right to receipt of public school funds, a state school is not permitted to refuse funding because it disagrees

---

[4] AETN and the Public Broadcasting System amici cite other circuits which they say have concluded otherwise. Most significantly, they cite *Johnson v. FCC*, 829 F.2d 157 (D.C. Cir. 1987); *Chandler v. Georgia Public Telecommunications Comm'n.*, 917 F.2d 486 (11th Cir. 1990), *cert. denied*, 112 S.Ct. 71 (1991); and *Muir v. Alabama Educational Television Commission*, 688 F.2d 1033 (5th Cir. 1982), *cert. denied*, 460 U.S. 1023 (1983). These cases do not precisely address the case before us. *Chandler* involved a factual situation similar to that in the case at bar; however, the Georgia Public Telecommunications Commission had offered the candidates there thirty minutes of air time to respond to the debate from which they were excluded, something AETN allegedly refused to do for Forbes. Additionally, we respectfully disagree with the Eleventh circuit's conclusion that the First Amendment was not implicated by the Georgia public television station's actions. See *Chandler*, 917 F.2d at 490-94 (Clark, J., dissenting). *Muir* did not involve a debate at all, but rather an attempt by Alabama and Texas public television viewers to force their public television stations to air a particular show. *Muir* correctly assesses the right of the public to have access to air time, but does not address the situation facing us here. *Johnson* involved a broadcast debate sponsored by a third party, not by a public television station.

with an organization's message). It should be noted that the Public Television station amici acknowledge that AETN does not have the right to exclude Forbes simply because they disagree with his point of view. Certainly, were the answer otherwise, there would be nothing to prevent the party in power from excluding all opposing parties, or particular religions, or minorities from public-television-sponsored debates.

III.

AETN has not filed an answer to Forbes's complaint; therefore, it has not yet articulated any principled reason for excluding Forbes. See *Cornelius*, 473 U.S. at 811 ("existence of reasonable grounds for limiting access to a nonpublic forum, however, will not save a regulation that is in reality a facade for viewpoint-based discrimination"). AETN must provide a rational and viewpoint- neutral justification for its determination. On this record, AETN has not yet done so; therefore, Forbes has stated a claim upon which relief can be granted, especially if we credit Forbes's allegation, as we must in reviewing a Rule 12(b) (6) dismissal, that ⊥12 AETN planned to air "St. Elsewhere" rather than allow Forbes to debate.

So much of the judgment as dismissed Forbes's statutory claims is affirmed. So much of the judgment as dismissed his claim under the First and Fourteenth Amendment for failure to state a claim is reversed, and the cause is remanded for further proceedings consistent with this opinion. That portion of *DeYoung v. Patten* which holds that the First Amendment places no restraint, beyond that imposed by the Communications Act, on the right of state agencies to sponsor candidate debates and pick and choose which candidates may take part, is overruled. [5]

It is so ordered.

---

[5] Our holding applies only to debates that are sponsored by state instrumentalities. It does not apply to private-television-sponsored debates, nor to debates sponsored by third parties that are reported in good faith by public television stations.

McMILLIAN, Circuit Judge, joined by JOHN R. GIBSON, Senior Circuit Judge, FAGG, MAGILL, and HANSEN, circuit Judges, concurring in part and dissenting in part.

Although I agree with most of the majority opinion, for the reasons discussed below, I would affirm the order of the district court dismissing Forbes's complaint. Accordingly, I concur in part and dissent in part.

It has been an instructive experience to reconsider these issues. As a preliminary matter, however, I would hold that the FCC has exclusive, jurisdiction of this litigation, including both the statutory and the constitutional claims, with judicial review in the court of appeals and then the Supreme Court. *See Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984); *see also Columbia Broadcasting System. inc. v.* ⊥13 *Democratic National Comm.*, 412 U.S. 94 (1973); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

> Balancing the various First Amendment interests involved in the broadcast media and determiningwhat best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved [since 1927]. . . .
>
> . . . The judgment of the Legislative Branch cannot be ignored or undervalued simply because [Forbes has cast his] claims under the umbrella of the First Amendment. That is not to say that we "defer" to the judgment of the Congress and the [Federal Communications] Commission on a constitutional question, or that we would hesitate to invoke the constitution should we determine that the Commission has not fulfilled its task with appropriate sensitivity to the interests in free expression.

Columbia Broadcasting System. Inc. v. Democratic National

Comm., 412 U.S. at 102-03.

It may be true that the FCC is not as vigilant or as sensitive to first amendment interests as it should be. *See Muir v. Alabama Educational Television Comm'n*, 688 F.2d 1033, 1056-57 (5th Cir. 1982) (banc) (Frank M. Johnson, Jr., J., dissenting), *cert. denied*, 460 U.S. 1023 (1983). It may also be true that technological changes since the Supreme Court decided *Red Lion Broadcasting Co. v. FCC* in 1969 have largely undermined the basis for the existing pervasive federal regulation of the broadcasting industry as a whole and, as a result, "raise a significant possibility that the First Amendment balance struck in *Red Lion* would look different today." See *Arkansas AFL-CIO v. FCC*, 11 F.3d 1430, 1442 (8th Cir. 1993) (banc) (Richard S. Arnold, C.J., concurring in the judgment). However, absent such developments, I would require Forbes to raise ⊥14 both his statutory and constitutional claims in proceedings before the FCC and not as an original matter in the district court.

Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes's 42 U.S.C. § 1985 civil conspiracy claim because his allegations were too vague and his 42 U.S.C. § 1981 claim because he failed to allege discrimination on the basis of race. Slip op. at 7. I also agree the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. *Id.* at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. *DeYoung v. Patten*, 898 F.2d 628, 633-34 (8th cir. 1990) (no implied private right of action). I also agree that Forbes cannot use 42 U.S.C. § 1983 to enforce these statutory claims. Slip op. at 7. *DeYoung v. Patten*, 898 F.2d at 634-35 (§ 1983 remedy

foreclosed by comprehensive enforcement mechanism).

With respect to Forbes's first amendment claim, I also agree that there is state action for purposes of § 1983 because AETN is an instrumentality of the state. It is a state-owned, noncommercial, public television station; its employees are state employees who are represented in this appeal by the state attorney general. Slip op. at 8; *DeYoungv. Patten*, 898 F.2d at 631-32. I do not agree, however, that Forbes, even though he was a legally qualified candidate, had a first amendment right to be included in the candidate debate or that the candidate debate was a public forum for first amendment purposes. In my view, the candidate ⊥15 debate was a nonpublic forum. Like private commercial television, public television is not a traditional public forum; it does not extend a general invitation to the public to appear on or participate in its programs. Nor do I think the candidate debate was a limited or quasi-public forum; the format of this candidate debate Was not compatible with either unrestricted public access or with unrestricted access by all of the legally qualified candidates. For this reason, I would hold that the candidate debate was a nonpublic forum.

"Control over access to a nonpublic forum can be based on . . . speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius v. NAACP Legal Defense & Education Fund*, 473 U.S. 788, 806 (1985) (citations omitted). Presumably, AETN decided to limit the number of candidates in order to maintain a traditional debate format, rather than to expand the format to a panel discussion. Because AETN has yet to file an answer, AETN's reasons for designing the format of the candidate debate as it did are not known. However, it would not have been unreasonable or viewpoint-specific for AETN to have limited the candidate debate to only the two major party candidates, thus excluding minor party candidates and independent candidates, or, for that matter, to the two candidates who had the most support or who appeared to have the most likely chance of winning, for example, on the basis of poll results. It may not have been good programming, or even good politics, given voters' inter-

est in and the occasional historical success of minor party and independent (and even fringe) candidates, to limit the candidate debate to the two major party candidates. Nonetheless, I would hold that AETN had the editorial and programming discretion to structure the candidate debate along those lines and that excluding Forbes from the candidate debate for those reasons would be viewpoint neutral. ⊥ 16

A true copy.
Attest.

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

Ralph P. Forbes, and	*	
The People,	*	
Appellant,	*	Appeal from the
	*	United States
vs.	*	District Court
	*	for the Western
Arkansas Educational	*	District of
Television Commission	*	Arkansas
Network Foundation,	*	
etc., et al.,	*	
Appellees.		

The petition for rehearing by the appellant is denied.

June 21, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-1031WAFS

Ralph P. Forbes, etc., Appellant,	*	
	*	Appeal from the United States District Court for the Western District of Arkansas
vs.	*	
Arkansas Educational Television Commission Network Foundation, et al., Appellees.	*	

Appellant's motion to recall the mandate has been considered by the Court and is denied.

July 19, 1994

Order Entered at the Direction of the Court:
s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

United States Court of Appeals
For The Eighth Circuit

NO. 92-3374WA

Ralph P. Forbes, and the People, *Appellant,* v. Arkansas Educational Television Communications Network Foundation, and its Board of Directors in their official capacities; Arkansas Education Telecommunications, and its members and officers; Susan J. Howarth, in her official capacity as Executive Director; Victor Fleming, in his official capacity as Chairman; G.E. Campbell, in his official capacity as Vice-Chairman; Dr. Caroline Whitson, in her official capacity as Secretary; Diane Blair, in her official capacity as Commissioner; S. McAdams, in his official capacity as Commissioner; James Ross, in his official capacity as Commissioner; Jerry McIntosh, in his official capacity as Commissioner; Lillian Springer, in her official capacity as Commissioner; Amy L. Oliver, in her official capacity as Production Manager;	* * *

Bill Clinton, in his official capacity as Governor of the State of Arkansas; and John Does;
Appellees.

Filed: December 22, 1992

Before RICHARD S. ARNOLD, Chief Judge, McMILLIAN and JOHN R. GIBSON, circuit Judges.

PER CURIAM.

This case is before us on petition for rehearing. This appeal, which involves only the question of preliminary injunctive relief, has become moot. The debate in question has been held, and it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning.

Accordingly, the appeal is dismissed as moot. This cause is remanded to the District Court with instructions to vacate its order, denying preliminary injunctive relief on the merits, and to enter a new order, denying the motion for preliminary injunction as moot.

The underlying case is not moot. The complaint contains a prayer for money damages. The District Court should proceed to determine the case and enter final judgment, following which any party aggrieved is at liberty to file a new notice of appeal. See *McFarlin v. Newport Special School District*, No. 92-1570 (8th Cir. December 3, 1992). The petition for rehearing is denied as moot. A separate order will be entered on the suggestion for rehearing en banc.

It is so ordered.
A true copy.
Attest:
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE PLAINTIFFS

v. Civil No. 92-2190

The ARROGANT ORWELLIAN BUREAUCRATS of the ARKANSAS EDUCATIONAL TELEVISION COMMISSION, and its BOARD of DIRECTORS in their official capacities; KHBS TV CHANNEL 40; KHOG TV CHANNEL 29 and DARRELL CUNNINGHAM, in his individual capacity; et al. DEFENDANTS

ORDER

On this 16th day of December, 1992, upon consideration of defendants' motions to dismiss, the court finds for the reasons set forth in a letter of even date that said motions should be and hereby are granted and this case is dismissed with prejudice.

IT IS SO ORDERED.

s/ H. Franklin Waters
United States District Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
POST OFFICE BOX 1908
FAYETTEVILLE, ARKANSAS 72702-1908

H. FRANKLIN WATERS,
CHIEF JUDGE

December 16, 1992

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Box 88
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Fort Smith, Arkansas 72902-2023

RE: *Ralph P. Forbes and the People v. The Arrogant Orwellian Bureaucrats, et al.*
Civil No. 92-2190

Gentlemen:

Currently before the court is a motion to dismiss filed by separate defendants Susan J. Howarth, Victor Fleming, G.E. Campbell, Dr. Caroline Whitson, Diane Blair, S. McAdams, James Ross, Jerry McIntosh, Lillian Springer, Amy L. Oliver and William Clinton, sued in their official capacities as members and officers of the Arkansas Educational Telecommunications Network by plaintiff Ralph Forbes. Also before the court for consideration is a motion to dismiss filed by

separate defendants KHBS TV Channel 40, KHOG TV Channel 29, and Darrell Cunningham, sued in his individual capacity by Forbes. The court has considered these motions and the response thereto filed by Mr. Forbes and is now ready to rule. For the reasons set forth below, the defendants' motions to dismiss should be and are hereby granted.

Ralph P. Forbes was an independent candidate for the office of United States Representative for the 3rd congressional District of Arkansas. Forbes initiated this action on October 19, 1992, just

All Counsel of Record December 16, 1992 Page 2

weeks before the November 3, 1992 presidential and congressional election, alleging that the AETN separate defendants planned to unlawfully and unconstitutionally exclude him from a congressional debate to be sponsored and broadcast by AETN on Thursday, October 22, 1992. On behalf of himself and his constituents, Forbes alleged that the AETN defendants unlawfully closed down polling places in counties he carried in the 1990 election, tampered with the voting process in an attempt to defeat him, and denied his access to public facilities for expression of his political beliefs. Forbes alleged that his exclusion from the debate, coupled with actions taken by the defendants, deprived Forbes and his constituents their rights to vote under 42 U.S.C. § 1981. Forbes sought declaratory and injunctive relief plus compensatory and punitive damages.

Forbes then requested an "emergency temporary restraining order with demand for accelerated consideration and expedited injunctive relief" to enjoin defendants from barring his participation in the October 22nd debate. By order on October 20, 1992, this court denied Forbes' request for injunctive relief. Forbes appealed the decision to the Court of Appeals for the Eighth Circuit, and on October 21, 1992, Judge Richard S. Arnold made the provisional ruling that the district court, pursuant to *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), correctly had denied injunctive relief. On October 22, 1992, Judges Arnold, McMillian and Gibson

reviewed the order entered by Judge Arnold on the previous day. The panel found that *DeYoung* was binding precedent and dispositive of the matter, and affirmed the decisions of the district court and Judge Arnold.

On November 2, 1992, Forbes amended his complaint to include commercial television broadcasting stations KHBS TV Channel 40, its affiliate KHOG TV Channel 29, the American Broadcasting Company (ABC), and their agent Darrell Cunningham, in his individual capacity. Forbes additionally alleged that these defendants refused to air his political Pro-Life advertisements at any time other than the "safe harbor" hours between 11:00 p.m. and 6:00 a.m. In violation of 42 U.S.C. § 1981 and the First and Fourteenth Amendments to the United States Constitution.

The separate defendants have filed a Rule 12(b) (1), (2) and (6) motion to dismiss this action, asserting that the court lacks subject matter and personal jurisdiction under the Eleventh Amendment. Defendants also assert that plaintiff (1) has no First or Fourteenth Amendment right to appear on a public television debate; (2) has no personal claim or cause of action under the Federal communications Act to appear on a public television political debate; and (3) has failed to state a claim under 42

U.S.C. § 1981. Defendants additionally assert that Forbes does not share an injury with the members of the purported class pursuant to Rule 22 of the Federal Rules of Civil Procedure, that Forbes has failed to state a cause of action against separate defendants Oliver and Clinton, and that the issues raised by Forbes have become moot by the passage of the election.

Defendants KHBS, KHOG and Darrell Cunningham have also filed a Rule 12(b)(1) and (6) motion to dismiss, asserting that the court has no subject matter jurisdiction for a violation of the Federal Communications Act. Defendants also assert that Forbes has failed to exhaust his administrative remedies and failed to state a cause of action under 42 U.S.C. § 1981.

A Rule 12(b) motion is to be read as a whole, *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), and it is to be denied unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Bennett v. Berg*, 710 F.2d 1361 (8th Cir. 1983). In addition, complaints are to be "liberally construed in favor of the plaintiff," *See Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969), and *United States v. Advance Machine Corp.*, 547 F.Supp. 1085, 1088 (D. Minn. 1982). It has also been said that all facts pleaded in the complaint are taken to be true for 12(b)(6) purposes, *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976), and all reasonable inferences from facts pleaded in the complaint are to be drawn and deemed to be true. *See* Wright & Miller, *Federal Practice and Procedure* § 1363 (1969).

After an examination of Forbes' complaint and amended complaint, it is apparent that Forbes can "prove no set of facts in support of his claim which would entitle him to relief." In light of *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990), Forbes has no cause of action under either the Federal communications Act or 42 U.S.C. § 1983 for denial of participation in the congressional debate or for denial of requested air time for political advertisements. Furthermore, Forbes had failed to state a claim under 42 U.S.C. § 1981.

In his pleadings, Forbes leans heavily upon the constitution and its framers, asserting that he and his constituents have been denied their inalienable rights as American citizens to participate in election debates and television campaigning. Forbes, however, is erroneous in his reliance upon the constitutional provisions as providing a remedy in this instance. The Court of Appeals for the Eighth circuit recently held that a political candidate has no First Amendment right to appear on televised debates "to any extent

greater than the limited right of access granted by the equal time provision of the Federal Communications Act." *De-*

Young, 898 F.2d 632. Finding access to broadcasting to be a creature of federal statute, the court stated that

> [a] political candidate does not have a "constitutional right of broadcast access to air his [or her] views."

Id. at 632, quoting *Kennedy for President Comm. v. FCC*, 636 F.2d 417, 430-31 (D.C. 1980).

Thus, Forbes (sic) right to participate in televised debates and air political advertisements stems entirely from the equal time provision of the Federal communications Act. See 47 U.S.C. § 315(a). The Act, however, does not provide expressly for a private cause of action for violation of its provisions. While the DeYoung court found no legislative history on point, the court found the legislative structure of the Act and the FCC24 to be helpful. The court noted that the Act establishes "a unified and comprehensive regulatory system for the [telecommunications] industry." Id. at 633, quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137 (1940). Recognizing that Congress had created the FCC and granted it broad regulatory authority and remedial power, the court found that

> the administrative enforcement mechanism established by the Act and the broad authority vested in the FCC to regulate broadcasters in general and to enforce the equal time provisions in particular indicate that Congress did not intend to create a private cause of action to enforce the equal time provision.

DeYoung, 898 F.2d at 634. Thus, consistent with *DeYoung*, this court finds that Forbes has no federal cause of action pursuant to the Constitution or the Federal Communications Act for denial of participation in a congressional candidates' debate or for denial of Pro-Life advertisements at times other than "safe harbor" hours. Forbes must seek remedy for his alleged violations with the FCC. Likewise, Forbes has no cause of action for enforcement of the Federal Communications Act under 42 U.S.C. § 1983. The Eighth Circuit similarly held in

DeYoung that "a § 1983 remedy for violation of the equal time provision would be inconsistent with the overall legislative scheme." *DeYoung*, 898 F.2d at 635." Forbes' sole remedy for any alleged violation of the provision of this Act, therefore, lies solely within the administrative powers of the FCC.

All Counsel of Record December 16, 1992 Page 5

Forbes has also alleged that conduct on behalf of the defendants, in their official capacity, violated 42 U.S.C. § 1981. The complaint, however, is void of any alleged racial discrimination, fatal to a § 1981 claim. *Fantroy v. Greater St. Louis Labor Council*, 478 F.Supp. 355 (E.D. Mo. 1979). Forbes and his constituents have alleged discrimination by the defendants on behalf of Forbes' political beliefs rather than racially motivated discrimination. Thus, Forbes' § 1981 claim against the defendants must also fail as a matter of law. Likewise, Forbes conspiracy allegations must fail. It is well settled that unsupported, conclusory allegations of a conspiracy, such as those pled by Forbes, are insufficient to state a claim under the civil Rights Acts. *Slotnick v. Garfinkle*, 632 F.2d 163 (1st Cir. 1980). The court finds, therefore, that the plaintiffs' constitutional and statutory claims must fail as a matter of law. The defendants' motions to dismiss are granted and this action is dismissed.

A separate order in accordance herewith will be entered concurrently.

Yours very truly,

s/ H. Franklin Waters

cc: U.S. Clerk

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 92-3374WA

Ralph P. Forbes,
Appellant,

v.

Arkansas Educational Television Communication Network Foundation, et al.,
Appellees.

*
* On Motion for Injunction
* Pending Appeal from the
* United States District
* Court for the Western
* District of Arkansas.

Filed: October 21, 1992

Before RICHARD S. ARNOLD, Chief Judge.

ORDER

This matter was heard in chambers by me as a single circuit judge, upon the application of the appellant for injunctive relief pending appeal. After a full argument and discussion of all of the issues, I denied the motion. The reasons are fully stated on the record, and a transcript of the proceedings, including the reasons for the decision, is available to either side by arrangement with the Court Reporter.

The most important point, in my view, is that the plaintiff-appellant has only a small chance of prevailing on the appeal, under the controlling precedents of this Court, especially *DeYoung v. Patten*, 898 F.2d 628 (8th Cir. 1990). This case appears to be a conclusive precedent against most

of the appellant's theories, and it of course binds me, as it bound the District Court.

I have instructed the Clerk to submit the matter of injunctive relief pending appeal to a panel of three judges, including me. The panel will endeavor to rule on the question before the television debate in question, which is scheduled for 7:00 p.m. on the evening of Thursday, October 22, 1992. I have explained to both sides that my ruling is provisional only, and that the panel can overturn it.

Motion denied.

/s/ Richard S. Arnold
Richard S. Arnold, Chief Judge
United States Court of Appeals
for the Eighth Circuit

Order entered at direction of Court:
s/ Michael E. Gans (?)
Clerk, U.S. Court of Appeals, 8th Circuit

DECLARATION OF RIGHTS

Petitioner Forbes has not had the funds to pay for transcripts of these October 21, 1992, proceedings at the conclusion of which Gene Goss vowed to telecast *St. Elsewhere* re-runs rather than allow the people to hear Forbes . However, petitioner believes the following controlling questions of law and fact in answer to Petitioner's **DEMAND FOR DECLARATORY JUDGMENT**, pursuant to 28 USC §§ 2201 and 2202, were conceded in oral argument by the state defendants and verbally affirmed by the Court:

Therefore, the People are sovereign over AETN *or any other bureaucracy,* and the people have a *vital right* to know, and be informed, especially in matters relating to elections.

The Voters of Arkansas have the right to see and hear *all* Candidates and all views, ideas and opinions, so they can cast

an informed ballot on November 3rd, 1992.

And, Ralph P. Forbes, is an American Citizen whose rights must be protected.

Plaintiff Forbes is the legally qualified, certified Independent Candidate for the office of Representative from the third congressional district of the State of Arkansas who has the right to be afforded equal broadcasting opportunities with all other candidates.

And that Forbes' status as a candidate carries with it an inherent, inseparable, indivisible right for the people to hear his uncensored views protected by the equal broadcasting opportunities established by law to protect not the rights of the candidate, but also the paramount rights of the people.

Plaintiff Forbes is entitled to Equal Opportunities and Protections by the First, Fifth and Fourteenth Amendments to the United States Constitution, and numerous laws, statutes, etc., made in pursuance thereof, including but not limited to *47 USC 315, 396*, and *OMB Circular 128*, et seq.;

The Constitution of the State of Arkansas, and numerous laws, statutes, etc., made in pursuance thereof, including but not limited to *ACA 6-3-101*, et seq. . . .;

. . .

Wherefore, the People of Arkansas, and Independent Candidate Ralph Forbes, have enforceable rights . . .

* * *

The foregoing **Declaration of Rights**, *status, and controlling questions of law and fact* were conceded by the state defendants and verbally confirmed by the Court at the Hearing on October 21, 1992.

APPENDIX H

Pertinent Parts Of THE CONSTITUTION OF THE UNITED STATES

The Constitution, the Supreme Law, the Paramount Contract, *Controlling* Compact, and The Overruling Law of The Land, states in pertinent parts:

Preamble

We the People of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defence, promote the general welfare, and secure the blessing of liberty to ourselves and our posterity, do ordain and establish the Constitution of the United States of America.

Article I.

Sect. 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Sect. 2. The House of Representatives shall be composed of members chosen every second year *by the people* of the several states ... {Italics supplied by Petitioner.}

Article III.

Sect. 2: 1. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States ...

Article IV.

Sect. 2: 1. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

Sect. 4. The United States shall guarantee to every State in this Union a republican form of government ...

Article VI.

Sect. 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof ... shall be the supreme law of the land; and the judges in every State

shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Sect. 3. ... and all executive and judicial officers, both of the United States and of the several States, shall be bound, by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

PREAMBLE TO THE BILL OF RIGHTS

The conventions of a number of the States having at the time of their adopting the Constitution of the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added: And as extending the ground of public confidence in the Government, will best insure the beneficent ends of its institution.

1st Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

5th Amendment

No person shall be ... deprived of life, liberty, or property, without due process of law ...

7th Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact, tried by a jury, shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

9th Amendment

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

14th Amendment

Sect. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.

Sect. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State. .. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State. . . .

Sect. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX I
Pertinent Parts Of
THE UNITED STATES CODE

JURISDICTION

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. *28 USC § 1331*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interests and costs, and is between --

(1) citizens of different States; . . .

(c) For purposes of this section ...

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principle place of business ... *28 USC § 1332*

Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

(4) To recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights, including the right to vote. *28 USC § 1343*

The district courts shall have original jurisdiction of any civil action commenced by any person to recover damages for any injury to his person or property on account of any act done by him, under any Act of Congress, for the protection or collection of any of the revenues, or to enforce the right to vote of citizens of the United States to vote in any State.

28 USC § 1357

The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of subchapter 1-A to 1-C of this chapter shall have exhausted any administrative of other remedies that may be provided by law. *42 USC 1973j(f)*

28 USC § 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 USC § 2202. Further relief

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

TITLE 5 UNITED STATES CODE § 706
Administrative Procedure Act

To the extent necessary to decision and when presented, *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.* The reviewing court shall - - -

(1) compel agency action *unlawfully withheld or unreasonably delayed;* and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be - - -

(A) *arbitrary , capricious, an abuse of discretion, or otherwise not in accordance with law;*

(B) *contrary to constitutional right, power, privilege, or immunity;*

(C) *in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;*

(D) *without observance of procedure required by law;*

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) *unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.*

In making the foregoing determinations, *the court shall review the whole record or those parts of it cited by a party,* and due account shall be taken of the rule of prejudicial error.

(Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.) Italics supplied

CIVIL ACTION FOR DEPRIVATION OF RIGHTS

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in at action at law, suit in equity, or other proper proceeding for redress ...

Title 42 USC, Section 1983

Application of 1979 amendments. Act Dec. 29, 1979, P.L. 96-170, §3, 93 Stat. 1284, which appears as 28 USCS § 1343 note, provided that the amendments made to this section by such Act are applicable with respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after enactment on Dec. 29, 1979.

CONSPIRACY TO INTERFERE WITH CIVIL RIGHTS

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.*

Title 42 USC, Section 1985 (3) Italics supplied

42 USC 1986 provides: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section (1985 of Title 42) are about to be committed, and having power to prevent or aid in preventing the commission of same, neglects or refuses to so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act which such person by reasonable diligence could have prevented; and such *damages may be recovered in an action on the case;* and any number of persons guilty of such wrongful act, neglect, or refusal, may be joined as defendants in the action.

[Italics supplied.]

47 USC § 312 provides:

Administrative Sanctions (a) The Commission may revoke any station license or construction permit --

... (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy. *cf.*, 47 CFR 73.1944 @44a

47 USC § 315 says in pertinent part:

(a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this section upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any --

(1) *bona fide* newscast,

(2) *bona fide* news interview,

(3) *bona fide* news documentary (if the appearance of the candidate is incidental to the presentation of the subjects covered by the news documentary), or

(4) on the spot coverage of *bona fide** news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. *Nothing in the foregoing sentence shall be construed as relieving broadcasters,* in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.* [Italics supplied.] *cf.*, 47 CFR 73.1941

**bona fide:* in good faith, without fraud; authentic, genuine, legitimate

TITLE 5 U.S.C. § 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter [5 USCS §§ 551 et seq.].

(b) A person *compelled* to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. *With due regard for the* convenience and *necessity of the parties* or their representatives *and within a reasonable time*, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or

data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) *Prompt notice shall be given of the denial in whole or in part* of a written application, petition, *or other request* of an interested person made in connection with *any* agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

{Italics supplied.}

Title 47 U.S.C. §402. Judicial review of Commission's orders and decisions

(a) Procedure

Any proceeding to enjoin, set aside, annul or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.].

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any *applicant for a construction permit or station license,* whose application is denied by the Commission.

(2) By any *applicant for the renewal or modification of any such instrument* of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any *such instrument* of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any *applicant for the permit* required by section 325

of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the *holder of any construction permit or station license* which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by order of the Commission granting or denying any application *described in paragraphs (1) to (4) of this subsection.*

(7) By any person *upon whom an order to cease and desist has been served* under section 312 of this title.

(8) By any *radio operator* whose license has been suspended by the Commission.

(c) Filing notice of appeal; contents; jurisdiction; temporary orders

Such appeal shall be taken by filing a notice appeal with the court within thirty days from the date upon which public notice is given of the decision or order complained of. Such notice of appeal shall contain a concise statement of the nature of the proceedings as to which the appeal is taken; a concise statement of the reasons on which the appellant intends to rely, separately stated and numbered; and proof of service of a true copy of said notice and statement upon the Commission. Upon filing of such notice, the court shall have jurisdiction of the proceedings and of the questions determined therein and shall have power, by order, directed to the Commission or any other party to the appeal, to grant such temporary of relief as it may deem just and proper. Orders granting temporary relief may be either affirmative or negative in their scope and application so as to permit either the maintenance of the status quo in the matter in which the appeal is taken or the restoration of a position or status terminated or adversely affected by the order appealed from shall, unless otherwise ordered by the court, be effective pending hearing and determination of said appeal and compliance by the Commission with the final judgment of the court rendered in said appeal.

(d) Notice to interested parties; filing of record

Upon the filing of any such notice of appeal the appellant shall, not later than five days after the filing of such notice, notify each person shown by the records of the Commission to be interested in said appeal of the filing and pendency of the same. The Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28.

(e) Intervention

Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

(f) Records and briefs

The record and briefs upon which any such appeal shall be heard and determined by the court shall contain such information and material, and shall be prepared within such time and in such manner as the court may by rule prescribe.

(g) Time of hearing; procedure

The court shall hear and determine the appeal upon the record before it in the manner prescribed by section 706 of title 5, United States Code [5 USCS § 706].

(h) Remand

In the event that the court shall render a decision and enter an order reversing the order of the Commission, it shall remand the case to the Commission to carry out the judgment of the

court and it shall be the duty of the Commission, in the absence of the proceedings to review such judgment, to forthwith give effect thereto, and unless otherwise ordered by the court, to do so upon the basis of the proceedings already had and the record upon which said appeal was heard and determined.

(i) Judgment for Costs

The court may, in its discretion, enter judgment for costs in favor of or against an appellant, or other interested parties intervening in said appeal, but not against the Commission, depending upon the nature of the issues involved upon said appeal and the outcome thereof.

(j) Finality of decision; review by Supreme Court

The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

(As amended Sept. 13, 1982, P.L. 97-259, Title I, §§ 121, 127(b), 96 Stat. 1097, 1099; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(50, 98 Stat. 3361.)

{Italics supplied.}

Title 28 § 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --

(1) all final orders of the Federal Communication Commission made reviewable by section 402(a) of title 47;

* * *

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title {which *requires* the agency to *"promptly* give notice thereof ..."}.

Title 28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) *of this section.*

{Italics supplied.}

Title 28 U.S.C. § 1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

(June 25, 1948, c. 646, § 1, 62 Stat. 944; May 24, 1949, c. 139, § 90, 63 Stat. 102.)

APPENDIX J: Pertinent Parts Of FCC Rules & Regulations

47 C.F.R. § 73.1941 provides:

(a) *General requirements.* Except as otherwise indicated in § 73.1944, no station licensee is required to permit the use of its facilities by any legally qualified candidate for public office, but if any licensee shall permit any such candidate to use its facilities, it shall afford equal opportunities to all other such candidates for that office to use such facilities. *Such licensee shall have no power of censorship over the material broadcast by any such candidate* ... {Italics supplied.}

47 C.F.R. § 73.1944 provides:

(a) Section 312(a)(7) of the Communications Act provides that the Commission may revoke any station license or construction permit for *willful* or repeated failure to allow reasonable access to, or to permit purchase of, reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

(b) *Weekend Access.* For purposes of providing reasonable access, *a licensee shall make its facilities available for use by federal candidates on the weekend before the election* if the licensee has provided similar access to commercial advertisers during the year preceding the relevant election period. *Licensees shall not discriminate between candidates with regard to weekend access.* {Italics supplied.}

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
21 AUG 1992

IN REPLY REFER TO:
8210-AJZ/MJM

Vincent A. Pepper, Esquire
Counsel, Gillett Communications of Atlanta, Inc.
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006

Irving Gastfreund, Esquire
Kaye, Scholer, Fierman, Hays & Handler
901 - 15th Street, N.W., Suite 1100
Washington, D.C. 20005

Dear Messrs. Pepper & Gastfreund:

This is in reference to the 'Petition for Declaratory Ruling' filed on behalf of Gillett Communications of Atlanta, Inc. ('Gillett'), licensee of television station WAGA-TV, Atlanta, Georgia, as well as the 'Petition for Declaratory Ruling' filed by Kaye, Scholer, Fierman, Hays & Handler ('Kaye Scholer'), a law firm representing 'numerous' unnamed television and radio stations. These petitions both claim that federal candidate anti-abortion political advertisements featuring dead fetuses and fetal tissue depict excretory activity and are therefore indecent. Consequently, they seek our concurrence that channelling the advertisements to hours when children are unlikely to be in the audience would be consistent with the 'reasonable access' and 'no-censorship' provisions of the Communications Act of 1934, as amended (Sections 312(a)(7) and 315, respectively).

Factual Background

Gillett poses the following question:

> Whether a licensee may channel a use by a legally-qualified federal candidate to a safe harbor when chil-

dren are not generally present in the audience if the licensee determines in good faith that the proposed use is indecent or otherwise unsuitable for children.

Gillett states that certain political advertisements feature graphic depictions of dead fetuses and that the candidate sponsors of these advertisements have sought and obtained broadcast time on WAGA-TV pursuant to the reasonable access provisions of Section 312(a)(7). . . .

* * *

Discussion

To the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue is -- indecent, we decline to so rule. [WAGA-TV]s request are also at odds with Commission decisions that have declined to render indecency rulings in advance of broadcasts to avoid imposing prior restraints on protected speech. *See Letter to William J. Byrnes, Esquire (WBAI(FM))*, 63 RR 2d 216 (MMB 1987), *review denied sub nom. Pacifica Foundation, Inc.*, FCC 87-215, released June 16, 1987; *Letter to Christian Action Network*, (MMB) released June 12, 1992.

Similarly, *we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as indecent so that they may restrict the time at which it airs* even where it does not meets the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. Such channeling would violate a federal candidate's reasonable access rights under Section 312 (a) (7) of the Act, which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities. As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening. We have also ruled that candidates are entitled to access to "prime time." *Report and Order in the Matter of Commission Policy in Enforcing Section 312(a)(7) of the Communications Act*, 68 FCC 2d 1079, (1978)... [F]ederal

candidates ... cannot be banned from entire dayparts. 68 FCC 2d at 1091. Therefore, the practice of channelling material that is not indecent, even if content-neutral (*i.e.*, channelling all federal candidates to specific times of the day or evening when there may be no reasonable risk of children in the audience) would deprive federal candidates of their rights to determine how best to conduct their campaigns. See *CBS, Inc.*, 453 U.S. 367 (1981).[1] .. {at 2 and 3, bold emphasis supplied.}

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[1] ... [I]ndecency enforcement is currently restricted to material aired between 6:00 a.m. and 8:00 p.m. *See Kansas City Television Ltd.*, 4 FCC Rcd 6706 (1989) {f.n. 1 at 3}

* * *

The Commission has defined indecency as "language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs." *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987)

Upon review of the tape submitted by Gillette [WAGA-TV], *we conclude that the advertisement is not indecent* ... Neither the expulsion of fetal tissue nor fetuses themselves constitutes "excrement."[2] ... {at 4}

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[2] Webster's Dictionary defines "excrement" as "waste material, especially fecal matter, expelled from the body after digestion." Webster's II New Riverside University Dictionary, p. 451 (1984). Federal case law has been similarly restricted in scope. *See, e.g., L.M. Communications*, 7 FCC Rcd 1595 (MMB 1992); *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). at 4

* * *

In view of the foregoing, the requests for declaratory ruling by Gillett Communications of Atlanta, Inc., and Kaye, Scholer, Fierman, Hays & Handler ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

s/ Roy J. Stewart
Roy J. Stewart, Chief
Mass media Bureau

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

October 30, 1992

IN REPLY REFER TO:
DA 92-1503

Mr. Daniel Becker
Becker for Congress
P.O. Box 845
Canton, Georgia 30114

Dear Mr. Becker,

This responds to your complaint, filed October 28, 1992, concerning the refusal of WAGA-TV, Atlanta, Georgia, to air your 30 minute political program "Abortion in America: the Real Story." WAGA-TV apparently recognizes your right as a federal candidate to seek "reasonable access" to its broadcast facilities under Section 312(a)(7) of the Communications Act and its obligation under Section 315(a) of the Act not to censor programming aired on behalf of political candidates. It appears however, that WAGA-TV believes that your program includes indecent material and that if it were to broadcast this material outside the indecency "safe harbor," it would violate the indecency prohibition contained in 18 U.S.C. Section 1464. Accordingly, WAGA-TV has offered to provide you with price and availability information for airing your ad in the "safe harbor" period, but has otherwise declined to accept the advertisement. You have asked the Commission to intervene to ensure that you are granted access to air the subject program.

The Commission and Bureau have declined to render indecency rulings in advance of broadcasts.[1] *See Letter to Christian Action Network* (MMB), released June 12, 1992 (Bureau declined to render indecency ruling in advance of broadcasts to avoid imposing prior restraints on protected speech. . .

* * *

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[1] By contrast, the Bureau did make an indecency ruling on a ***different*** anti-abortion advertisement *after* the ad had

actually aired on a television station. *See Gillette Communications of Atlanta, Inc. and Kaye, Scholer, Fierman, Hays and Handler*, DA 92-1160 (MMB), released August 21, 1992. **The Bureau concluded that the advertisement was not indecent *and that licensees therefore could not "channel" the ad to the indecency safe harbor without running afoul of Sections 312(a) (7) and 315 of the Communications Act.*** The instant case presents the separate question of whether a licensee, in the absence of a Commission ruling as to whether a given political commercial is or is not indecent, may nonetheless channel the advertisement to the indecency safe harbor where it reasonably and in good faith determines that the ad is indecent.

{Bold emphasis supplied by petitioner.}

* * *

Sincerely,

s/ William H. Johnson(?)
for Roy J. Stewart
Chief, Mass Media Bureau

REQUEST FOR DECLARATORY RULING CONCERNING ACCESS TO TIME ON BROADCAST STATIONS, 25 F.C.C.2d 216 (1970)

"Although the First Amendment would clearly ban governmental censorship of speech content, government must be concerned about the *procedural rules* that control the public forums for discussion. If someone - a moderator, or radio-television licensee - applies rules that give one speaker, or viewpoint, less time (or none at all) to present a position, *then a censorship exists as invidious as outright thought control.* There is little doubt in my mind that for any given forum of speech the First Amendment *demands* rules permitting as many to speak and be heard as possible. *And if this Commission does not enact them, then the courts must require them.*"

FCC Commissioner Johnson, *25 F.C.C.2d 216, 232.*
Quoted in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 93 S.Ct. at 2115-2116; 412 U.S. at 161

* * *

"The issue before us ought to be stated starkly. It is, quite simply, *who is to retain the potential to rule America?* We know, if we are to be honest with ourselves, which segments of the economic and social structure have the loudest voices in the decision-making process in Washington. But the potential for popular check remains. *It remains, however, only so long as the people can obtain education and information,* only so long as they can communicate with each other, only so long as they can retain potential control over the mass media of the country. So long as we preserve the people's potential to rule - their potential opportunity to participate in the operation of their mass media - there is some hope, however small, that some future generation - perhaps the next - will use this potential to rebuild America."

Nicholas Johnson, Federal Communications Commissioner, Testimony to the United States Senate Subcommittee on Communications, (1969)

Emphasis supplied by Petitioner

JOINT APPENDIX OF THE FEDERAL COMMUNICATIONS COMMISSION

The Commission has long held that its function is not to judge the merit wisdom or accuracy of any broadcast discussion or commentary but to insure that *all viewpoints* are given fair and *equal opportunity for expression* and that controverted allegations are balanced by the presentation of opposing viewpoints. *Any other position would stifle discussion and destroy broadcasting as a medium of free speech * * * More often that (sic) not this would operate to deprive the public of the opportunity to hear unpopular or unorthodox views.*

Joint Appendix 69 cited favorably ("The Commission declared that its historic policy *in conformity with Congressional authority precluded censorship of programs*") by Judge BURGER in *Anti-Defamation League of B'Nai B'rith, PAC. S.W. R. O. v. F.C.C.*, 403 F.2d 169 (1968) at 170-171

* * * * * * *

Nevertheless these subjects will and must be discussed. But they cannot be freely discussed if there is to be an official ban on the utterance of "falsehood" or an "appeal to prejudice" as officially defined. *All that the government can properly do, consistently with the right of free speech, is to demand that the opportunity be kept open for the presentation of all viewpoints.* Yet this would be impossible under the rule espoused by the ADL. The present case illustrates the matter. The assailed commentator here does not ostensibly attack the Jews as a religious group, but does attack Zionists and the ADL because the latter is conducting a campaign against "right wing extremists," which is said to include that commentator. But if anyone is permitted to express views favorable to Zionism or the ADL, or unfavorable to "right wing extremists" or the assailed commentator, then the Fairness doctrine requires that someone representing the contrary viewpoints be given the opportunity to reply. This, of course, is precisely what the ADL contends cannot be permitted. If what the ADL calls "appeals to racial or religious prejudice" is to be classed with hard-core obscenity, then it has no right to be heard on the air, and the only views which are entitled to be broadcast on matters of concern to the ADL are those

which the ADL holds or finds acceptable. *This is irreconcilable with* either the Fairness doctrine or *the right of free speech.*

Talk of "responsibility" of a broadcaster in this connection is simply *a euphemism for self-censorship.* It is *an attempt to shift the onus of action against speech* from the Commission to the broadcaster, but it seeks *the same result -- suppression of certain views and arguments.* Since the imposition of the duty of such "responsibility" involves Commission compulsion to perform the function of selection and exclusion and Commission supervision of the manner in which that function is performed, the Commission still retains the ultimate power to determine what is and what is not permitted on the air. *So this formulation does not advance the argument either constitutionally, ideologically or practically.* **Attempts to impose such schemes of self-censorship have been found as unconstitutional as more direct censorship efforts by government.** *Smith v. [People of State of] California*, 361 U.S. 147 [80 S.Ct 215, 4 L.Ed.2d 205] (1959); *Bantam Books v. Sullivan*, 372 U.S. 58 [83 S.Ct. 631, 9 L.Ed.2d 584] (1963); *Washington Post v. Keogh*, 125 U.S. App.D.C. 32, 365 F.2d 965 (1966), *cert. denied*, 385 U.S. 1011 [87 S.Ct. 708, 17 L.Ed.2d 548] (1967).

FCC Commissioner Loevinger, **Joint Appendix** at 143-145 cited favorably as **"basic propositions which seem to us unanswerable"** by then Circuit Judge BURGER, Senior Circuit Judge WILBUR K. MILLER and Circuit Judge J. SKELLY WRIGHT in *idem*, 403 F.2d 169 (1968) at 172

For the FCC to promulgate rules regarding permissible and impermissible speech relating to religion *would be not only an egregious interference with free speech in broadcasting,* but also an unconstitutional infraction of the free exercise clause and the establishment clause of the First Amendment.

FCC Commissioner Loevinger,
Joint Appendix at 143-145 cited favorably by Judge BURGER in *idem.*, 403 F.2d 169 (1968) at 171-172

{Italics and emphasis supplied.}

APPENDIX K: CONTENT OF *CENSORED* FORBES' AD THE KHOG DEFENDANTS CLAIM WAS "INDECENT"

Audio & Video:

[1] "When you spread your hands *to pray,* I will hide my eyes from you; Yea, when you make many prayers, I will not hear: [For] Your hands are full of blood!" Isaiah 1:15

[2] "God who gave us life also gave us our rights." Thomas Jefferson warned us: "God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God? Indeed *I tremble for my country when I reflect that God is just, that his justice cannot sleep forever.*"

Thomas Jefferson,
***Notes on the State of Virginia*, (1781-1785)**

Tag Lines

[3] Vote for someone you can trust *for a change!* Vote for Ralph Forbes, our Independent Candidate for U.S. Congress.

[4] Political ad paid for by Forbes for US. Ralph Forbes, Independent Candidate.

Video: In addition to the audio/video text, the video portion of the ad showed: [1] a brief ten (10) second montage of "bloody" hands "washing" in a bowl of pizza sauce, with the words "Jobs! Crime! Health costs! AIDS!" scrolling over, to represent a visual illustration of Forbes' views of the spiritual state of the nation condemned by God through the prophet Isaiah, interspersed with three (3) transient one (1) second flashes of aborted fetuses copied from FCC-*approved* (*Bailey*) visual scenes;* followed by [2] a picture of Jefferson; [3] and required video of Forbes over tags.

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*These *three* fleeting, *less than one-second* images were but a tiny fraction of the FCC-assented footage; and *less* than 10% of the censored Forbes' 30 second spot ad.

APPENDIX L: FORBES' INITIAL REQUEST TO AETN DEFENDANTS

FORBES FOR US
☆ Box 88 ☆
☆ London, AR 72847 ☆

501/293-4641

August 24, 1992

Ms. Susan Howarth
AETN, President
Box 100
Conway, AR 72032

Dear Ms. Howarth,

Thank you for fulfilling your civic duty by scheduling a debate between the candidate for the office of House of Representatives from the 3rd District of Arkansas.

This is to notify you that I am the certified Independent Candidate for this office, and I am respectfully requesting that I be included on equal terms with my two opponents in this debate.

Because I am a candidate for change, in the past I have experienced some shameful violations of my rights, including party bosses refusing to certify my nomination after I won a statewide primary election by 63% fair and square; being forced into a run-off after I won 53% of the total vote in a 3-way statewide primary in which I carried 72 of Arkansas' 75 counties. The run-off was an illegal election because more than 75% of the voting places required by law to be open were closed in the 72 counties which I carried in the primary. These are only a few of the blatant examples of discrimination, dirty politics and suppression of the democratic process in thousands of pages of court cases in state and federal courts in Arkansas.

It is my experience that the politicians, their fat cat wire pullers, and the special interests that control this state will stop at nothing, no matter how low down, filthy, disgusting and illegal, including censorship, denial of the right to vote via *affirmative action* "elections," conspiring to deny rights under color of law, *ad nauseam,* to prevent the People from replacing these crooks and their tyrannical ilk.

Ms. Howarth, I am certain that you and AETN want to do the right and fair thing by inviting me, but I am also sure you will be subjected to tremendous pressures to censor me and my ideas. This is especially undesirable as the eyes of the nation and the world will be focused on Arkansas during this presidential election with Governor Clinton being the supreme executive over the publicly owned, Arkansas Education Television Network.

Let me share some of the thoughts and words of one of my philosophical mentors that are a strong defense against those who would try to deny the people of Arkansas, especially the 3rd District, from hearing me and my ideas to help them:

"If a nation expects to be ignorant and free, in a state of civilization, it expects what never was and never will be." Thomas Jefferson, Letter to Col. Charles Yancey, Jan. 6, 1816

"Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day." Thomas Jefferson,
Letter to Du Pont de Nemours, April 24, 1816

"I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them, but to inform their discretion." Thomas Jefferson,
Letter to William Charles Jarvis, Sept. 28, 1820

"Men by their constitutions are naturally divided into two parties:

(1) Those who fear and distrust the people, and wish to draw all powers from them into the hands of the higher classes.

(2) Those who identify themselves with the people, have confidence in them, cherish and consider them as the most honest and safe, although not the most wise depository of the public interests. In every country these two parties exist: and in every one where they are free to think, speak and write, they will declare themselves." Thomas Jefferson,
Letter to Henry Lee, Aug. 10, 1824

"For here we are not afraid to follow the truth *wherever it might lead,* nor to tolerate any error *so long as reason is left to combat it.*"
Thomas Jefferson

"The basis of our government being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers, or newspapers without government, I should not hesitate a moment to prefer the latter."
Thomas Jefferson, Letter to Col. Edward Carrington, Jan. 16, 1787

"God who gave us life gave us liberty. Can the liberty of a nation be secure when we have removed a conviction that these liberties are a gift of God?

Indeed I tremble for my country when I reflect that God is just, that his justice cannot sleep forever."
Thomas Jefferson, *Notes on the State of Virginia,* (1781-1785)

"I have sworn upon the altar of God, eternal hostility against every form of tyranny over the mind of man."
Thomas Jefferson, Letter to Dr. Benjamin Rush, Sept. 23, 1800

The wording of *47 USC 315* is so plain and simple that every ordinary American with the common sense God gave him or her knows what it says and that it means I have a right to appear and they have a right to hear me so they can make an intelligent, informed choice when they vote.

"I believe there are more instances of the abridgment of the freedom of the people by gradual and silent encroachments *of those in power* than by violent and sudden usurpations."
James Madison,
Speech in the Virginia Convention, June 16, 1788

Unfortunately, in 1983 some lawyers and bureaucrats arbitrarily, misinterpreted the exemption provisions, so that *a la 1984*'s "*Ministry of Truth*" the law means exactly the opposite of what it says:

"Affording equal access to all candidates," according to these worm-tongued, truth-twisters, "means that those in power may exclude and discriminate against candidates of genuine change."

But double-minded Orwellian double-speak and double-think is, alas, all too common in the Alice in Wonderland created by the politicians and special interest lawyers who run this country as if they were the Mad Hatter, the March Hare and the Queen of Hearts.

To deny anyone equal access is discriminatory and wrong, isn't this true?

To suppress any ideas or censor anyone's expression of opinion is a violation of Free Speech, which I am sure you would not allow to happen.

Ms. Howarth, I would appreciate receiving your reply to my request for equal opportunity and free speech as soon as possible.

Because if the dirty politics I have fought in the past is still doing "bidnis" as usual and if they have the power to pressure AETN to deny me and the people of Arkansas our rights, *then I must have sufficient time to exhaust my "administrative remedies," so I can get an appropriate order from a federal court in time so the people can hear me before the election is over.*

Yours for A Free and Equal Opportunity America,

s/ Ralph P. Forbes
Ralph P. Forbes

CC:

VOTE FOR SOMEONE YOU CAN TRUST
FOR A CHANGE

Appendix M: Forbes' First Appeal To The FCC & First Denial by the FCC

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE

EMERGENCY

- VS -

CIVIL RIGHTS

THE ARROGANT ORWELLIAN BUREAUCRATS OF AETN;
THE CROOKED LYING POLITICIANS;

CLASS ACTION

CIVIL ACTION

THE SPECIAL INTERESTS;

NO. 92-2190

INCLUDING CERTAIN MEDIA "PERSONALITIES" WHO HAVE SOLD OUT THE PEOPLE AND BETRAYED THE ETHICS AND PRINCIPLES OF PROFESSIONAL JOURNALISM;
AND GOVERNOR CLINTON OF THE STATE OF ARKANSAS; DEFENDANTS

MOTION FOR EMERGENCY TRO WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER PRIOR TO OCTOBER 22ND, 1992, TO PROTECT THE INTEGRITY OF THE ELECTORAL PROCESS IN ARKANSAS

* * *

4. Defendant Howarth denied Forbes his right to be included in a letter dated September 4th, 1992. [Plaintiffs' #4]

5. On September 9th, 1992, at approximately 1:15 p.m., Candidate Forbes called the Federal Communications Commission aka FCC's political branch at 202/632-7586. After waiting on "hold," a receptionist said she was connecting Forbes with "Mr. Gross' office." Forbes then stated his case to the person he was connected to at the FCC's bureaucracy. Forbes said he believed the people had a right to hear him and he

had a right to speak and be heard. Forbes said he was aware of FCC rulings circa 1986 that reversed the long standing rule that *station sponsored, staged "debates" were not bona fide news events.* Forbes stated that he did not agree with the administrative rule taking power and rights from the people, but even *if* it were permissible for a commercial broadcaster to get away with excluding candidates, *this case was different because* ***AETN is a public broadcaster owned by the people of Arkansas.***

The FCC bureaucrat told Forbes he did not care because he believed all broadcasters had the power to exclude anyone they wanted to suppress, and the FCC was not sympathetic to anyone who felt they were being treated unfairly. He said they get many such complaints every election and they turn them all down. He advised Forbes to "just take it and forget it about it," because his complaints and appeals to the FCC were "only a waste of everybody's' time."

Forbes replied that he felt strongly that the airwaves belong to the people, not the bureaucrats nor the special interests, and that he wanted to challenge the FCC ruling in court.

The FCC bureaucrat told Forbes he was wasting his time because his request for bureaucratic action by the FCC wouldn't get to first base until long after the debate was over, and that the election would be history long before Forbes could ever had his case turned down, appealed, reviewed, turned down, etc. through a long cycle of rubber stamp decisions. He said candidates all over the country complain that exclusion and discrimination is unfair; they "eventually respond to all complaints," but the FCC has only three lawyers to handle these complaints and it would likely be months before they would officially notify Forbes of their first denial.

Forbes then asked the bureaucrat for an immediate ultimate denial so that he could have it as something tangible to take to court to vindicate his and the people's rights.

The bureaucrat replied that even though all of the denials would be cut and dried at every step of the process, and

even though all of Forbes' appeals through the FCC's bureaucratic red tape would be a futile waste of time and effort, he told Forbes he still had to go through the motions.

Forbes repeated his demand that the FCC order AETN to afford him equal opportunities. Forbes also asked the bureaucrat what his name was. The bureaucrat refused to tell his name and told Forbes his name "doesn't make any difference, because you can't win."

Whereupon, Forbes wrote a letter to Mr. Milton Gross, chairman of the FCC, again repeating his request for a speedy denial because **Justice Delayed *Is Justice Denied!***
[Plaintiffs' #5]

6. Mr. Gross wrote a letter to Forbes stating it must have been someone else to whom Forbes spoke at the FCC.
[Plaintiffs' #6]

7. As of this date Candidate Forbes has heard nothing further from the FCC and AETN is hardening its resolve to deny the people their right to hear Forbes, and the plaintiff knows of no other adequate remedy under law other than to appeal to this court for injunctive relief.

"WHEREVER LAW ENDS, *TYRANNY BEGINS.*"
John Locke, *Second Treatise of Government,* Sec. 202 (1690)

8. Defendant Amy Oliver is reported in the press as saying the reason AETN denied the people their right to hear Forbes is because AETN decided that Forbes was "not a serious candidate." [Copy of news report, Plaintiffs' #7]

9. Nowhere is there a requirement that a candidate must be "serious" to enjoy equal rights. The definition of "serious" is so vague and broad and incapable of certainty as to be *prima facie* unconstitutional, and unconstitutionally irrational, capricious, arbitrary and malicious as applied to Plaintiff by Defendant AETN.

This law suit, the effort to overcome the state's uncon-

stitutionally burdensome restrictions to gain ballot access, the around the clock work schedules, the travel, the grueling campaigning, the expenses, *ad infinitum,* are all evidence that Candidate Forbes is serious, and that's *the real reason* the Defendants are seeking to exclude him and deny the people their right to hear serious Candidate Forbes and his serious ideas.

Plaintiffs respectfully remind the Court: THE PEOPLE of Arkansas expressed their will and intent by doing the almost impossible task of qualifying Ralph Forbes as the only Independent candidate for the office of Representative from Arkansas' third district to the Congress of the United States.

In 1986 Forbes won 63% of the vote in a statewide primary. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

[Copies of letters from the erstwhile heads of both the Democratic and Republican parties of Arkansas showing that *they consider Forbes to be a serious candidate with worthwhile ideas that must be respected and who has a strong grass roots support among the ordinary people of Arkansas,* Plaintiffs' #s 8 & 9].

Appendix N: FORBES' SECOND APPEAL TO FCC TO ESCAPE EXERCISE IN FUTILITY

FORBES FOR US
☆ Box 88 ☆
☆ London, AR 72847 ☆

501/293-4641

Mr. Milton Gross
FCC Federal Communications Commission
2025 M St NW #8202
Washington, DC 20554

Mr. Gross,

As per our phone call* I strongly object to AETN's decision to deny the people of Arkansas their right to be fully informed and hear the views of all candidates for U.S. Congress.

It Was The People, *Not The Greenback Dollar,* nor the party bosses, nor the "bidness as usual" fat cats, who put me on the ballot. It is the People who own the airwaves and the "public" broadcasting station in particular, so it is ludicrous that the Clinton administration would attempt to censor the only populist candidate and deny the people their right to hear him.

I understand that the FCC is not sympathetic to my appeal, and that I will be "lucky" to get a "staff denial" before the debate; and I also understand, from what you told me, that I will be turned down every step of the way, so that by the time I ever get into a higher court the debate and the election will be long over.

"JUSTICE DELAYED IS *JUSTICE DENIED!*"

So, I am requesting that if all my appeals to the FCC are merely going to be rubber-stamped denials, that [A] you simply deny my all my administrative appeals forthwith, so that I can take my complaint to the federal courts as soon as possible;

Or, [B] in the alternative, please send me a reply immediately stating that I have no hope of administrative relief but that the soonest the FCC can officially notify me that you have denied my request will be by [__/__/__] such and such a date, and that I probably will not exhaust my administrative remedies until [__/__/__] such and such a date.

Yours truly,
s/ Ralph P. Forbes
Ralph P. Forbes

*Even though the person I spoke with wouldn't tell me his name, I believe it was Mr. Gross to whom I was connected with and spoke to about this matter.

cc:

VOTE FOR SOMEONE YOU CAN TRUST
FOR A CHANGE

APPENDIX O

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

SEP 28 1992

IN REPLY REFER TO:
1800C3
92090605

Mr. Ralph P. Forbes
FORBES FOR US
Box 88
London, AR 72847

Dear Mr. Forbes:

This refers to your undated letter received on September 21, 1992. I should first point out that none of the attorneys in the branch recall any telephone conversation with you. In any event we routinely identify ourselves when speaking to callers. You may have spoken to one of the summer interns, who are no longer with us.

The nature of your complaint is not clear from your letter. For your information, however, all legally qualified candidates for federal office have a right of access to broadcast stations. Commercials stations are not required to give free time. The burden of proof is on the candidate to show that he or she is legally qualified.

Enclosed is our political package which explains the political laws and describes how to file a complaint. You will note that a candidate must include all information necessary to support a complaint. Of particular relevance is the requirement that a complaint first must be made to a specific broadcaster.

If after contacting the broadcast station you still wish to file a complaint, you should follow the procedures set forth in the enclosure, and we will give any complaint filed appropriate consideration.

Sincerely,

s/ Milton O. Gross
Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

There were *no enclosures* included, nor mailed separately. *cf.* p. 69 a.

APPENDIX P: FORBES' NOVEMBER 2, 1992, LETTER TO FCC COMPLAINING OF KHOG DEFENDANT'S CENSORSHIP OF ADS

FORBES FOR US
☆ Box 88 ☆
☆ London, AR 72847 ☆

501/293-4641

Mr. Milton Gross
FCC Federal Communications Commission
2025 M St NW #8202
Washington, DC

November 2, 1992

Mr. Gross,

On Friday, October 30th, 1992, at the close of the business day, Mr. Darrell Cunningham arbitrarily, invidiously and wrongly censored and refused my political spots and refused to run them during the contracted times on the two channels he controls; KHBS TV Ch. 40 UHF, Fort Smith, Arkansas and KHOG TV Ch. 29 UHF, Fayetteville, AR.

These ads included some of the footage approved in the Michael Bailey hearings, FCC 8210-AJZ/MJM of 21 Aug. 1992, et seq.

These ads include only portions of the approved Bailey footage.

They contain NO sexual parts, activities, etc.

All of this and more was respectfully explained to Mr. Cunningham.

His capricious, malicious and unlawful decision has caused irreparable harm to the public who have an inherent right to Freedom of Information and to cast a ballot based upon informed consent and to my candidacy for U.S. Congress.

Therefore, I believe it is appropriate that the license to operate for the above two ABC affiliates be suspended or revoked at least until such time as they have responsible management and ownership.

Yours truly,

s/ Ralph P. Forbes

Ralph P. Forbes

cc:

VOTE FOR SOMEONE ~~YOU~~ CAN TRUST
FOR A CHANGE

APPENDIX Q: FORBES' JUNE 28, 1994, LETTER TO FCC COMPLAINING OF KHOG DEFENDANT'S CENSORSHIP OF ADS

Ralph P. Forbes
Box 88
London, AR 72847

June 28, 1994

Mr. Milton O. Gross, Chief
Political Programming Branch
Enforcement Division/ Mass Media Bureau
2025 M St NW 8202 (1919 M St NW)
Wash DC 20554

RE: 93-1031WAFS in The Eighth Circuit Court of Appeal

Dear Mr. Gross,

This is to request information on the status of my complaints against several licensees (AETN Conway, AR; KHBS TV40 Ft. Smith, AR; KHOG TV29UHF Fayetteville, AR; KPOM TV Ft. Smith, AR & KFAA, Rogers, AR) regulated by the FCC for violations of my rights expressly protected by the 1st & 14th Amendments to the U.S. Constitution; *47 USC 312 & 315* and other laws, case laws and FCC regulations, such as *CBS, Inc.*, 453 U.S. 367 (19810; 68 FCC 2nd 1079, 1090, 1091 (1978); FCC letter 8210-AJZ/MJM; et seq.

In particular, I direct your attention to my letter of November 2nd, 1992, copy attached. As of this date I have heard nothing from your office in response to this serious complaint.

Sincerely,
s/RPF
Ralph P. Forbes

cc: Clerk of 8th Circuit; Mr. C. Grey Pash; Ms. Renee Licht; Mr. Tom Gay; Mr. James P. Mercurio; Mr. Robert L. Jones III; Ms. Rita Spillenger, ACLU; etc.

APPENDIX R

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUL 19 1994

IN REPLY REFER TO:
1800C3-B
94070038

Ralph P. Forbes
Box 88
London, AR 72847

Dear Mr. Forbes:

This refers to your letter received by the Commission on July 5, 1994. You request information about the status of a pending complaint dated November 2, 1992, which you claim was sent to the Commission. You enclosed a copy of that complaint.

We have reviewed our records and can find no letters from you during the proximate period following November 2, 1992. We did locate, however, an undated letter from you received by the Commission on September 21, 1992, to which we responded on September 23, 1992, For your convenience, we have enclosed that correspondence. As our letter noted, it was unclear from your September 21, 1992, correspondence precisely what the nature of your complaint was. With reference to your November 2, 1992, letter, you claim that your political advertisments(sic) were censored because two Arkansas television broadcast stations (KHBS, Ft. Smith and KHOG, Fayetteville) refused to air them as scheduled prior to the November 1992, elections. Although you do not specifically describe your spots, you indicate that they contained some of the same footage depicted in the spots of Michael Bailey, a candidate for Congress in the November 1992 Indiana elections. Mr. Bailey's spots have been the subject of other complaints related to their graphic, abortion-related content.

On October 30, 1992, in response to concerns about the effects political advertising depicting graphic, abortion-related material may have on children, the Commission issued a 'Public Notice/Request for Comments," a copy of which is enclosed. This document initiated an inquiry regarding the appropriate treatment of political advertisements featuring abortion footage, aborted fetuses, or other such material. The Notice sought comment on what right or obligation a station has to channel to the "safe harbor" hours for indecent programming (currently 8:00 p.m. to 6 .00 a.m.) political advertisements it reasonably and in good faith believes are indecent or otherwise harmful to children. The Commission indicated that until a decision is reached, broadcasters may channel to the safe harbor hours political advertisements which they believe to be indecent.

Until the Commission issues its decision on the matters raised in the Notice, we are holding in abeyance all the complaints in this area which we have received from a number of candidates in various jurisdictions. If you would provide additional information about the circumstances involved in your complaint, we will consider your concerns as soon as the Commission releases its decision on the issues raised by the Notice. Specifically, you must furnish a description of the schedules of time purchased at each station, the actual placement of each spot, and the explanation each station gave you for refusing to broadcast your spots as scheduled. You should also provide a tape or transcript of each spot, if available.

Sincerely,
s/ Milton O. Gross
Milton O. Gross
Chief, Political Programming Branch
Enforcement Division
Mass Media Bureau

Enclosure

Again, there were *no enclosures* included, nor mailed separately. *cf.* p. 64 a.

APPENDIX S: PERTINENT PARTS OF CANDIDATE FORBES' LETTER OF ACKNOWLEDGMENT & AFFIDAVIT TO THE ARKANSAS SECRETARY OF STATE

FORBES FOR CONGRESS
Box 88
London, AR 72847

July 21st, 1992

Hon. W.J. "Bill" McCuen
Secretary of State
State Capitol
Little Rock, AR 72201-1094

Dear Secretary McCuen,

* * *

Secretary McCuen, also I believe you should be aware of "Unwarranted Restrictions" in violation of the constitutional protections for the people to procure petitions. ...

... I found the level of opposition by entrenched special interests and some officious bullies in positions of power to be even more oppressive.

In particular, I want to officially notify the State of Arkansas of an incident that happened on July 14 in Rogers, Arkansas. More than 90% of people qualified to sign my petitions signed them...

Again, at least 90% of the qualified voters signed my petitions. On this occasion I met five voters who said they were already committed to Hutchinson, but three of these persons signed my petitions because they believed I should have the right to run and they wanted to have more choices on the ballot. Two of them were very hostile, especially because I was collecting signatures in Benton County. Shortly thereafter, *a policeman approached me and told me I had to stop collecting petitions.* I respectfully told him that both the United States and Arkansas Constitutions protected my right to petition and run for office. He said that didn't matter in Benton Coun-

ty. I then respectfully asked him to look at copies of two U.S. Supreme Court cases decided on June 26, 1992, #s 91-155 & 91-339. These cases upheld the rights of members of the Hare Krishna sect to exercise rights protected by the 1st amendment in airport shopping malls, parking areas, hallways, etc. I explained I was NOT a hare krishna, I didn't particularly care for them, etc.; *but that I have Rights at least equal to them or anyone else!*

He said he didn't care because Rogers and Benton County had laws against what I was doing and he would run them or anyone else out of town just as fast as was running me out. Because it would be impossible for me to meet the July 18th deadline if I was in jail, I had no choice but to leave and go back to Washington County to continue collecting petitions.

This is especially onerous to me, because in 1986 and 1990 the most basic rights to vote, etc. were denied to me and tens of thousands who voted for me by a small clique of professional politicians who controlled the Republican party. You may recall the most recent example, when I was forced into a run-off by the mysterious discovery of bloc votes the day after the preferential primary. When these party bosses decided all of their money and dirty tricks would not be enough to defeat me, they resorted to closing down the voting places in the 72 counties I carried, and allowed hostile crossovers to vote against me.

Secretary McCuen, I know you agree this is a free country based on law, laws made and enforced in pursuance of the Constitution, and I don't believe you would ever tolerate such un-American police state violations of basic rights; but I believe you and other constitutional officers should be aware of the constitutionally "Unwarranted Restrictions" ordinary people have to overcome to exercise our most sacred, fundamental and basic rights. ...

Sincerely,
s/ Ralph P. Forbes
Ralph P. Forbes

Enc. Copy of Amended "Receipt for Initiative Petitions"

APPENDIX T-1: PERTINENT PARTS OF AVERRED AND VERIFIED COMPLAINT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT, FORT SMITH DIVISION

RALPH P. FORBES AND THE PEOPLE — EMERGENCY CIVIL RIGHTS CLASS ACTION CIVIL ACTION NO. 92-2190

- VS -

THE CROOKED LYING POLITICIANS;

THE ORWELLIAN BUREAUCRATS OF AETN;

THE SPECIAL INTERESTS;

CERTAIN MEDIA "PERSONALITIES" WHO HAVE SOLD OUT THE PEOPLE AND BETRAYED THE ETHICS AND PRINCIPLES OF PROFESSIONAL JOURNALISM;

AND GOVERNOR CLINTON OF THE STATE OF ARKANSAS;

DEFENDANTS

ALL OF WHOM, JOINTLY, AND/OR SEVERALLY, BY SINS OF OMISSION OR COMMISSION, HAVE CONSPIRED AGAINST THE PEOPLE TO DENY THEM THEIR RIGHT TO KNOW AND TO ROB AND DEFRAUD THE PEOPLE OF THEIR BIRTHRIGHT TO ELECT REPRESENTATIVES OF THEIR OWN CHOICE

WITH DEMAND FOR ACCELERATED CONSIDERATION AND EXPEDITED INJUNCTIVE RELIEF BY TEMPORARY RESTRAINING ORDER and DECLARATION OF RIGHTS PRIOR TO OCTOBER 22nd, 1922

* * *

THE DEFENDANTS HAVE CONSPIRED, jointly and severally, to Violate the Constitutions and laws of the United States and of the State of Arkansas, respectively, and to

transgress the rights of the people and destroy their right to free and independent self-government by denying the people their most fundamental rights to be informed and to vote effectively for their own enlightened self interests;

The defendants have conspired under color of law to deprive the people of their rights in numerous ways in a continuing defiance of the People, Law, Justice and Rights.

Defendant AETN is currently staging a so-called congressional "debate" that they plan to broadcast on October 22nd at 7:00 p.m., in which they are unconstitutionally and unlawfully excluding Independent Candidate Ralph P. Forbes that requires an immediate Declaration of Rights and Temporary Restraining Order to protect the people's rights, the integrity of the election and the rights of Candidate Forbes from irreparable harm as more fully shown in the separate motions and briefs.

The Plaintiffs

WE, THE PEOPLE, are that class of Persons, who are endowed by our Creator with certain inalienable and indefeasible Rights, in whom reside ultimate political power and sovereignty under God.

Defendants are unlawfully discriminating against that class of Citizens who petitioned to have the name of Forbes placed on the ballot as the people's Independent Candidate to represent the 3rd district in the United States Congress, and by denying equal rights to broadcasting opportunities on AETN, a television network owned by the People of Arkansas, they are trespassing against the rights of all Arkansans.

The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.

BRIEF STATEMENT OF THE CASE

This case arises because of a systematic and general conspiracy by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which party bosses, bureaucrats, and powerful special interests shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans for post-American "new world order."

The Defendants have continuously conspired to deprive the American People in general, the Voters of Arkansas and the third district, in particular, and the Plaintiff-in-chief, Independent Candidate Ralph Forbes of their most basic political Rights secured by the First Amendment to the United States, as more fully shown in this Complaint.

BRIEF STATEMENT OF THE FACTS

1. The people and Ralph Forbes have had their rights flagrantly and blatantly violated in a continuing pattern of abuse under color of law for many years.

2. In 1990 Forbes won 53% of the statewide vote in a 3-way race, carrying 72 of Arkansas' 75 counties and all 16 counties of the 3rd district by absolute majorities.

3. Certain of the defendants conspired against the people by wholesale bartering of bloc votes in Pulaski County and elsewhere to prevent the maverick populist Tommy Robinson off of the gubernatorial ballot. This same vote tampering forced Forbes into an unnecessary runoff election.

4. The runoff election was an avalanche of dirty tricks and violations of law, including certain of the defendants paying certain operatives thousands of dollars to wage a war of dirty tricks, lies, physical attacks against Forbes and to violate his rights and the rights of the voters by any means to prevent Forbes' election.

UNLAWFUL SELECTIVE AND DISCRIMINATORY CLOSING DOWN OF PRO-FORBES POLLING PLACES

5. When it appeared that all their attacks were backfiring and Forbes would be elected certain of the defendants systematically and selectively closed down more than 75% of the polling places, required by law to be open, in the 72 counties carried by Forbes.

VIOLATION OF EQUAL PROTECTION CLAUSE OF FOURTEENTH AMENDMENT

6. These Defendants denied Plaintiffs and their class, the grass-roots Arkansas Voters equal access to the ballot box and right of franchise in order to impair and Plaintiffs' rights of expression and association because of Plaintiffs status as probable Voters for Forbes.

7. Defendants, acting under color of state law for all times relevant to this lawsuit, knowingly and willfully discriminated against Plaintiffs by not allowing them equal access to polling places.

8. Denying persons equal access to use public facilities due to their political beliefs or activities impairs these persons' rights of political expression and association and violates the equal protection clause of Fourteenth Amendment.

9. In 1986 Forbes won 63% of the vote in a statewide primary. Certain Defendants publicly boasted it didn't matter how the people voted, they would stop Forbes from winning.

10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and he begs leave to amend this pleading by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of *42 U.S.C. 1981*, et seq.

11. Plaintiffs have been damaged as a result of said discrimination and will be irreparably damaged if such unlawful behavior is allowed to continue and are entitled to an injunct-

ion prohibiting further unlawful actions and are entitled to damages, costs and attorney's fees.

* * *

APPENDIX T-2: PERTINENT PARTS OF AMENDED (KHOG) COMPLAINT

18. Defendants KHBS TV and its sister affiliate KHOG TV are for profit corporations, affiliates of the American Broadcasting Company aka ABC and are licensed by the Federal Communications Commission and all conduct business throughout the State of Arkansas and the irreparable injuries against the people and plaintiff Forbes occurred with the third congressional district which lies with both the eastern and western judicial districts of Arkansas. In return for the extraordinary power, privilege and opportunity for profit temporarily bestowed upon them by the people entrusting them with a monopoly over the channel 29 and channel 40 broadcasting bands, respectively, the Defendants must comply with *Title 47 USCA, Section 315* of the United States Code which states in pertinent parts:

"... such licensee shall have no power of censorship over the material broadcast under the provisions of this section."

"Nothing in the foregoing sentence shall be construed as relieving broadcasters ... from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."

19. Defendants are bound also by the Constitutions of the United States and the State of Arkansas, the Law of the Land, the lawful courts, the FCC and its rulings, including *FCC 8210-AJZ/MJM* dated 21 August 1992 and attached hereto and incorporated herein and marked as *Plaintiffs' #16.*

20. Petitioner Forbes is a candidate for United States Congress and it is a great hardship and excessive burden upon him to be forced to leave the campaign trail to write legal

pleas to protect his rights and the rights of the people.

21. It was the great and irreparable harm inflicted on the people and Candidate Forbes by AETN defendants that forced Forbes to file this complaint at this time. However, that injury by AETN is only one in "a long train of abuses and usurpations, pursuing invariably the same object (a supplanting of government by the people, of the people and for the people with government by the bureaucrats, of the politicians and for the special interests, which) evinces a design to reduce (the people) under absolute Despotism," it is the petitioner's right, it is the petitioner's duty to defend the people and their rights and to provide new Guards for their future security.

{Paraphrased from our Declaration of Independence}

22. Petitioner Forbes, who is not backed by any PACs or special interests, caused to be produced a number of television ads to attempt to communicate his messages in less than 30 seconds.

23. Forbes caused to delivered a preliminary version of the ads on 3/4" video tape to a number of commercial broadcast and cable television stations throughout the 3rd district, including KHOG TV.

24. These tapes contained the basic footage showing that aborticide kills babies, the ugly truth and fact that Forbes' political opponents do not want the American people to know.

25. At approximately 2:30 - 3 p.m. on Friday, October 30, 1992, Candidate Forbes brought a copy of the final version of his ads to KHOG affiliate in Fort Smith.

26. Forbes gave the tape to Nancy Dolan who told Forbes the station could not legally censor nor refuse his spots, but they had to check them for certain technical specifications as to timing, scan lines, etc.

27. After waiting a long period of time, during which stations KHBS/KHOG TV broadcast programs containing materials

that Forbes and millions of other Christians deem offensive, indecent, immoral and just plain garbage, at approximately 4:00 p.m. CST Defendant Cunningham asked Forbes to come into his office and close the door.

28. Defendant Cunningham then told Forbes he could not air his Pro-Life ads. Forbes protested that it was his right to run his ads. Defendant Cunningham said he had just been on the telephone with his lawyer and that the FCC had just issued a new ruling giving station management the power to relegate materials they subjectively decide as "indecent" to the "safe harbor" hours between 11:00 p.m. and 6:00 a.m.

29. Forbes then cited the facts in *FCC 8210-AJZ/MJM* of 21 August, 1992. Forbes then related that congressional candidate Michael Bailey had already had his footage showing the "products" of aborticide approved by the FCC in April and July of this year and the FCC had ruled such pictures were *not* "indecent," and that Forbes' footage was taken from the Bailey ads, but that Forbes had not included all of the footage, but only a portion of the permissible pictures. Forbes also told defendant Cunningham that similar ads had been challenged in federal courts and that the courts had ruled the spots were protected by the First Amendment. Defendant Cunningham said in effect that he did not care what the law or the courts said he was censoring and refusing Forbes' ads.

Please see Plaintiffs' attachment, Letter from Candidate Bailey plus a video copy of the Bailey ads marked as Plaintiffs' #17.

30. Defendant Cunningham said that Forbes could move his spots from the chosen time periods to the late "safe harbor" times. Forbes protested that he picked the times he bought based on reaching the largest number of potential voters and forcing him to move to the undesirable times would irreparably harm his campaign. Defendant Cunningham said that was fine by him and said he would never run Forbes' ads in the favorable time slots. Forbes refused to give up his prime spots, but bought additional "safe harbor" slots under protest.

31. Forbes immediately attempted to call the FCC in Washing-

ton DC but the telephones were not answered. Forbes repeated his efforts throughout the weekend, but the FCC was closed.

32. Friday night, October 30th, Forbes attempted to get justice by calling the clerk of court and the magistrate at the U.S. Courthouse in Fort Smith. Forbes was told no judge would be available to help him until Monday morning.

33. Forbes also called the federal court in Little Rock and eventually reached Circuit Judge Morris Arnold who was working after hours. Judge Arnold is an appellate judge and has no authority to issue injunctive relief in the first instance.

34. Saturday morning Forbes reached Indiana congressional candidate Michael Bailey. Bailey told Forbes that the FCC ruling did not apply to Forbes' Pro-Life ads, but that someone issued a misleading interpretation at the close of business hours and that apparently TV stations all over the country were given information they could use as a pretext to censor all Pro-Life ads during the final critical hours of the campaign because it would be at least late Monday before the mess could be corrected; and by then it would be too late and the harm to Pro-Life candidates nationwide would be irreparable. However, as station management was notified of the facts they decided the Pro-Life spots could not be censored, denied or "moved to the back of the 'prime time' bus." These stations include WAVE and WHAS 11 in Louisville/Cincinnati; the Denver stations, etc.

Please see Plaintiffs' attachment, newspaper article from page 4A of Sunday's, (November 1st) Arkansas Democrat Gazette marked as Plaintiffs' #18.

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

First Amendment to the United States Constitution

... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any per-

son within its jurisdiction the equal protection of the laws.
Fourteenth Amendment to the United States Constitution

Candidate Forbes, has an equal right to accommodations, rights and privileges secured under the 14th Amendment to the United States Constitution and the Constitution of Arkansas as any other Citizen.

35. Plaintiff Forbes has suffered irreparable harm because of the unlawful, wicked, selective and invidious decision of KHBS defendants.

36. The most fundamental rights of the People to choose their own representatives based on informed consent have been flagrantly trespassed by the KHBS defendants.

This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracy against the people and their rights. The instant case against KHBS TV, et al, as more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And, therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received the fully amended pleadings;

* * *

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
in propia persona,
Box 88, London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 2 Day of Nov, 1992. My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, s/ Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this s/ 2nd Day of November, 1992, by hand or by U.S. mails as appropriate:

ABC; KHOG TV & KHBS TV
c/o Mr. Darrel Cunningham
Box 4150
Ft. Smith, AR 72914
501/783-4040

American Broadcasting Company
1330 Avenue of Americas
New York, NY 10019

Ms. Susan Howarth, Executive Director
AETN
350 S. Donaghey
Conway, AR 72032
501/682-4118 or 501/450-1727

Attorney General Winston Bryant
200 Tower Building
323 Center St.
Little Rock, AR 72201

Supreme Court, U.S.
FILED
941566 SEP 19 1994
OFFICE OF THE CLERK

No -

FILED
SEP 19 1994

In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

APPENDICES - II

Ralph P. Forbes,
Citizen In His Own Proper Person
Box 88
London AR 72847
501/293-4641

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APPENDIX U

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 92 -3374 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS, et al.
- VS -
THE ARROGANT ORWELLIAN BUREAUCRATS OF AETN;
APPELLEES et al

SUPPLEMENTARY DIGEST OF POINTS AND AUTHORITIES

✧

REBUTTAL TO STATE'S RESPONSE TO REQUEST FOR REHEARING *EN BANC* TO PROTECT THE SOVEREIGN RIGHTS OF THE PEOPLE AND THE LAW OF THE LAND

* * *

"Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are now after the lapse of more than seventy years (or, now, 200 years), sought to be avoided."

Mr. Justice DAVIS, *ex parte Milligan*, 4 Wall 2 (118) 1866)

* * *

"As the Supreme Court unanimously held in *Red Lion* {*Broadcasting Co. v. FCC,* 395 U.S. 367; 89 S.Ct. 1794; 23 L.Ed.2d 371 (1969)}:

'*It is the right of the viewers and listeners,* not the right of the broadcasters *which is paramount.* It is the purpose of

the First Amendment *to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,* rather than to countenance monopolization of the market, whether it be by the government or a private licensee. *It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.* ***That right may not constitutionally be abridged.'***

Red Lion, at 395 U.S. at 390, 89 S.Ct. at 1806 (citations omitted.)

"THE PROPER INQUIRY FOR THIS COURT, then, should not be whether the Communications Act grants state broadcasters editorial discretion, but *whether the action of state officials in these cases abridged free expression protected by the First Amendment.*

* * *

"... ('[S]peech concerning public affairs is more than self-expression; *its is the essence of self-government.')* Self-government suffers *when those in power suppress competing views on public issues...* See *(First Nat'l Bank of Boston v. Bellotti,* 435 U.S. 765; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978)).

[Emphasis supplied]

Muir v. Alabama Ed. Television Com'n., 688 F.2d at 1055

But protecting speech is not a burden on the nation, but a vital blessing. As Justice Charles Evans HUGHES said: "... the more imperative is our need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes if desired, may be obtained by peaceful means. **Therein lies the security of the Republic, *the very foundation of constitutional government.***"

DeJonge v. Oregon, 299 U.S. 353, 365 (1937)

"[F]ree and general discussion of public matters seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens."

Grosjean v. American Press Co., 297 U.S. 233, 250; 56 S.Ct. 444, 449; 80 L.Ed. 660 (1936)

"The basis of our government being the opinion of the people, the very first object should be to keep that right ..."

Thomas Jefferson,

Letter to Col. Edward Carrington, Jan. 16, 1787

* * *

THE F.C.C. "REVERSED" *DEYOUNG*

2-C. All of the precedents cited by State Defendants to abridge First Amendment Rights, including *DeYoung,* have been *factually* and *de jure* reversed and fatally invalidated by the FCC's own unilateral reversal of the Fairness Doctrine as more fully shown herein.

In all past cases where the rights of the People to hear and to be informed and the rights of candidates were restricted in seeking rights under *47 USC 315*, the courts weighed into the balance at least three counterbalancing factors, the most important and weightiest by far was The Fairness Doctrine.

This most important of these three balancing factors is {in fact, all three balancing factors, are} *absent from the balancing equation in the case at bar.*

"The magnitude of the present danger (the creation of propaganda organs for the Government) that the statute is designed to avoid is admittedly a matter about which reasonable judges may disagree. Moreover, I would agree that *the risk would be greater if other statutory safeguards* were removed ...*"

{Italics added}

FCC v. LWV of California, 104 S.Ct. at 3136, 468 U.S. at 417 (1984)

The FCC has unilaterally repealed the Fairness Doctrine by reinterpretation of its own rules in response to the pressures of the powerful broadcaster's lobby. *FCC 87-266*; MM-263, August 4, 1987; *FCC 88-131*; MM 319, March 24, 1988.

This revocation *de facto,* if not *de jure,* reverses all of the case law based on the supposed mitigating and "balancing" factor of the bureaucratically dispatched Fairness Doctrine.**

---

* The basis for the Fairness Doctrine *is statutory* ... Note 12 at 2106 and and 141; The Fairness Doctrine was recognized and implicitly approved by Congress in the 1959 amendments to §315 of the Communications Act ... Note 15, *Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com.*, 93 S.Ct. at 2127, 412 U.S. at 185 (1973)

"Thus, under the Fairness Doctrine broadcasters are responsible for providing the listening and viewing public with access to a balanced presentation of information on issues of public importance. The basic principle underlying that responsibility is 'the right of the public to be informed ..."

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2091, 412 U.S. at 113 (1973)

This decision, and all cognate decisions, were predicated on the cornerstone of the Fairness Doctrine. The CBS decision was based upon the specific warranty of the FCC that it would maintain and enforce the Fairness Doctrine against licensees to protect the First Amendment requirements of the People:

"The {FCC} Commission made it clear, however, that it does not intend to discard the Fairness Doctrine ..." {emphasis added}

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2101, 412 U.S. at 133.

However, the FCC broke faith with the Court, *the Constitution, the People, the Congress and its own longstanding rules and policies by unilaterally revoking and "discarding" the Fairness Doctrine.* This FCC (betrayal) demolished the foundations of all the progeny of cases from *Red Lion, supra.* While *DeYoung,* (1990) did not cite the FCC-assassinated Fairness Doctrine, *all* of the cases relied upon by the three judge panel depended upon the FCC-sabotaged *Fairness Doctrine.*

"Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken *within the framework of the regulatory scheme that has evolved over the course of the past half century.* For, during that time, Congress and its chosen regulatory agency have established *a delicately balanced system of regulation intended to serve the interests of all concerned."* {Italics supplied}

** If a bureaucratic interpretation has the power to disannul or repeal basic constitutional provisions and alienate inalienable rights and terminate indefeasible rights, then in such an illogical wonderland it would not be novel for an unelected bureaucrat to reverse and overturn decisions of the Supreme Court, including *Marbury v. Madison, supra.*

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2086, 412 U.S. at 102.

This citation was relied on by the appellate court in *Johnson v. F.C.C.*, 829 F.2d at 160, 161, et seq., because "the Commission in developing the fairness doctrine, had attempted to strike a balance that would satisfy the First Amendment interests of all concerned." And the pervasive, complex scheme of regulation provided "several access provisions," etc.

Johnson was decided September 22, 1987. Ironically, the FCC reversal that closed the remaining access provisions and pushed the delicately balanced regulatory scheme off the tightrope was issued after the case was argued but only a few weeks before the opinion which was based on the presumption that the Fairness Doctrine was alive and well, helping to prevent the First Amendment from falling to its doom.

The Fairness Doctrine was far from adequate in Petitioner's view, but without it, the regulatory scheme is totally unbalanced, and the results of every decision that weighed it into the balance would have been in favor of the People and the private Citizen.

"The opinion of the Court of Appeals asserted that the Fairness Doctrine, insofar as it allows broadcasters to exercise certain journalistic judgments over the discussion of public issues, *is inadequate to meet the public's interest in being informed.* The present (1972) system, the court held, 'conforms . . . to a paternalistic structure structure in which licensees and bureaucrats decide what issues are "important," and how "fully" to cover them, and the format, time and style of the coverage.'

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 146 U.S.App.D.C., at 195, 450 F.2d, at 656 ...

"That {Fairness} doctrine admittedly has not always brought to the public perfect or, indeed, even consistently high-quality treatment of all public events and issues ..."

Columbia Broadcasting Sys Inc., v. Democratic Nat. Com., 93 S.Ct. at 2100, 412 U.S. at 130.

"The Fairness Doctrine, standing alone, is insufficient - in theory as well as in practice - to provide the kind of 'uninhibited, robust, and wide-open' exchange of views to which the public is constitutionally entitled."

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2129, 412 U.S. at 187

("Because of the importance of the values at stake, and the ability of the defendant usually to offer *a colorably permissible reason* for its action, *the trier of fact must critically examine the asserted rationale for the defendant's conduct.*")
Muir, at 1059, italics supplied

* * *

"Although the scope of the prohibition was phrased in general terms and applied to a selected group of speakers, it was obviously directed at spokesmen for a particular point of view ... It was a classic case of viewpoint-based prohibition."
Comment on *Consolidated Edison Co. v. Public Service Comm'n of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)
Cited in *FCC v. LWV of California*, 104 S.Ct. at 3137, 468 U.S. 418

Thus, it is clear that the animus against petitioners, as persons and as a class of free and independent people and their ideas, is a prejudicial animosity against those, who champion Free Speech and Independent thought, by those in the state *nomenklatura* who feel they have a "divine right," or at least secular omnipotence, To Suppress And Discriminate Against Any Who Stray From Their Tyrannical Viewpoint of **"Politically Correct" *Thought Control.***

"If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought - not free thought for those who agree with us *but freedom for the thought that we hate.*"
Justice Oliver Wendell HOLMES, Jr. in
United States v. Schwimmer, 279 U.S. 644 at 653 (1928)

* * *

4. THERE IS NO EFFECTIVE "COMPREHENSIVE ADMINISTRATIVE SCHEME" TO PROTECT THE FEDERAL RIGHTS CONFERRED BY *47 USC 315.*

In fact the scheme is contrived to prevent *any* candidate denied these rights from ever exercising them. This scheme operated to make it impossible for Petitioner Forbes to have

his rights or remedial day in court. In the "Trinity" letter submitted by the State, after a page of unabashed bureaucratic gobbledegook in which the scheme is used to deny Trinity and the People of California their respective rights. The California debate was aired on May 17, 1992. The letter was released in Washington D.C. on May 26th, *nine days after the debate.* The election was June 2nd. This scheme that makes a mockery of justice and due process says: "Application for Review by the full Commission *may* be requested *within thirty days* of public notice of this letter ... by writing (to) the Secretary, Federal Communications, Washington, D.C. 20554 ..."

This scrap of paper, this blurry copy of a letter to someone from a bureaucrat in the FCC has no power to deprive the People, Forbes, *or any American Citizen of their God-given Rights secured by the supreme covenant, the Constitution of the United States.*

The obscure FCC letter has less weight than the "administrative summons" which the Supreme Court condemned as "**very oppressive**" *because it "appears to be a lawful command on the surface*, many citizens, because of their respect for what only *appears* to be law, *are cunningly coerced into waiving their rights*, due to ignorance ... because it *appears to be official and legal in form ..."* *United States v. Minker*, 350 U.S. 179 at 187

But even if the FCC protected the rights of Candidate Trinity, it's ruling would have come too late. For even if the FCC scheme were not stacked to *routinely* deny candidate and the People their rights, it fails, because:

JUSTICE DELAYED IS *JUSTICE DENIED.*

But the FCC *routinely* gives sweetheart interpretations to licensees that censor candidates and viewpoints and ambushes the People and their Rights in a hopeless *cul-de-sac.* "Was your denial in 'good faith'?" "Why, *of course.*" {Who would answer otherwise?} "Denial approved because the denier says it was done in 'good faith'."

Governmental opinion of enforceability of FCC rules clearly depends *on partisan interpretation.* e.g., See Note 8 at 3112, and "... the Department of Justice *under a new administration* announced that it would defend the statute." {italics supplied}
FCC v. League of Women Voters of California, 104 S.Ct. at 3113

This Court has the power and the duty to set aside any unlawful action that is unconstitutional, or arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The Constitution of the United States, Article III, Section 2; Article VI; Amendments I, V & XIV
Administrative Procedure Act, 5 USC 553, 706(2)(a)
Boyd v. United States, 116 U.S. 616 (1886)
Mugler v. Kansas, 123 U.S. 623, 661

In particular, the courts should not "'defer' to the judgment of the ... Commission on a constitutional question, or ... hesitate to invoke the Constitution ..."

Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2087; 412 U.S. at 103

* * *

"... The very simple answer to that position {that the courts defer to the Commission on constitutional questions} is that *FCC regulation is designed neither to preempt judicial scrutiny nor to redress state censorship as alleged in these cases.*" *Muir* at 1056

"I'll be judge. I'll be jury," said cunning old Fury; "I'll try the whole cause, and condemn you to death."

Lewis Carroll, *Alice's Adventures in Wonderland,* Ch. 3.

"... [W]hile it is true that the FCC hears complaints similar to those raised in these cases, *it is also true that the FCC routinely denies relief.* A brief review of the cases cited ... reveals that the FCC steadfastly refuses to depart from its 'longstanding policy of deferring to licensee discretion.' *Right to Life, Inc. v. WAVE-TV,* 59 FCC2d 1103 (1976.)" *Muir*, at 1056

"... [T]he FCC routinely defers to licensee 'discretion as to the manner in which a controversial issue is to be covered, including such matters as appropriate spokesman and program format.' *William Harsha,* 31 FCC2d 847 (1971). *Muir*, at 1057

"Complaints regarding (censorship) decisions are *regularly* denied (by the FCC)...) *Muir*, at 1056

"Thus it is clear that the majority's deference to the FCC in these cases that present important constitutional questions amounts to nothing more than '... a promise to the ear ...' which will most certainly be broken 'to the hope.' *See Cuthbert v. United States,* 278 F.2d 220 (5th Cir. 1960). Relying on the system of FCC regulation, the majority has granted state broadcasters immunity from constitutional scrutiny. There is nothing, however, in the Communications Act or in the system of FCC regulation which prevents judicial scrutiny. On the contrary, the Supreme Court has recognized the need for vigilance in the face of governmental regulation. *See, e.g., Red Lion, supra,* 395 U.S. at 390, 89 S.Ct. at 1806; *CBS, Inc. v. Democratic Nat'l. Comm.,* 412 U.S. at 104-05, 93 S.Ct. at 2087-88. *To rely on FCC regulation is to create a substantial gap in the protection of First Amendment interests.* Because the FCC does not distinguish between private and public broadcasters in its regulation of the airwaves ... *it provides no protection from the kind of state censorship alleged in these cases.* *Muir*, at 1057

"It is the judiciary which is the ultimate arbiter of the fundamental rights involved in these cases.[5] *Courts may not abdicate their duty by reference to a system of administrative regulation,* or because they would prefer that the plaintiffs take their complaints elsewhere.") *Muir*, at 1059

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5. The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities, and officials and to establish them as legal principles to be applied by the courts...

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943) *See Wesberry v. Sanders,* 376 U.S. 1, 17,18; 84 S.Ct. 526, 534-35; 11 L.Ed.2d 481 (1964).

"... ***[T]he Court has elevated 'the Communications Act above the Constitution.'*** "

Barnstone, supra, 514 F.Supp. at 672-73, 686.

Moreover, The Court Has Abdicated Its Duty In An Area In Which The Plaintiffs Have No Comparable Remedy...

Muir, at 1054 (Emphasis supplied.)

Thus, the People and Petitioner Forbes have no adequate

remedy under law other than *constitutional* courts and at least action under *42 USC 1981*, et seq.

THE UNBALANCED SCALES OF JUSTICE

5. In all past cases where the rights of candidates were restricted in seeking rights under *47 USC 315*, the courts weighed into the balance at least three counterbalancing factors:

(A) The Fairness Doctrine;

(B) Unrestricted access to buy time;

And, (C) alternate means of presenting views.

None of these three balancing factors are present in the case at bar.

Petitioner respectfully calls the Court's attention to ***The Factual Change That Changes The Results Of All Case Law*** from *Red Lion* through *DeYoung*. The FCC unilaterally repealed the Fairness Doctrine by reinterpretation of its own rules in response to the pressures of the powerful broadcaster's lobby. *FCC 87-266*; MM-263, August 4, 1987; *FCC 88-131*; MM 319, March 24, 1988.

This revocation *de facto,* and *de jure,* reverses *all* of the case law, including *DeYoung,* based on the supposed mitigating and "balancing" factor of the bureaucratically-dispatched Fairness Doctrine as more fully shown in petitioner's **"The FCC "Reversed" *DeYoung*"** in **2-C** above.

* * *

Furthermore, as a factual matter, *access to commercial time was also denied* Petitioner Forbes because, contrary to law, the ABC and NBC affiliates, licensed by the FCC to operate within the third district, censored and refused to air the FCC-approved ads of candidate Forbes causing him and the people grave and inestimable, irreparable harm.

The First Amendment; *The Due Process and Equal Protections provisions of the Fourteenth Amendment*; *CBS, Inc.*, 453 U.S. 367 (1981); Communications Act of 1934, Sections 312(a)(7); 315; CFR 73.1940(c);1941(b); 68 FCC 2d 1079 (1978); FCC 8210-AJZ/MJM of 21 August, 1992, et seq.

(C) All of the newsmedia in the third congressional district, contrary to the standards of professional journalism and the objective criteria for prioritizing the newsworthiness of stories, acted in concert to suppress virtually all news of Forbes' candidacy or to present him and his candidacy in an extremely distorted and inaccurate light.*

In the instant case, all balance is lost, because of the absence of all alleviating factors: (A) the Fairness Doctrine; (B) the right to buy time for political advertising; and, (C) the dearth of any ef-

---

*In any other area of life this would be a crime of theft by deception, fraud by misrepresentation, or at least a criminal conspiracy to withhold or suppress critical facts. For example, an insurance salesman would lose his license if he twisted the truth in this manner. Would an automobile manufacture that knew it's brake design was defective and that its cars were almost certain to burst into flames upon impact be allowed to mislead its customers that its products were safe? Yet the precious property of franchise and the right to representative government is less protected from fraud by charlatan counterfeit swindle than a consumer who falls victim to a fast talking con artist.

The effect of all this was to deprive voters of effective suffrage based upon informed consent: "*I wanted to vote for your husband (Petitioner Forbes), but I was afraid to throw my vote away!*" summarizes the quandary that *de facto* deprived the People of the third district of their right to freely choose their own representatives. This deceitful Hobson's choice is analogous to depriving an innocent accused of his right to counsel and *forcing him to make an uninformed or misinformed choice* between plea bargaining or "throwing your life and freedom away, because you can't win if you plead not guilty." *Miranda v. Arizona*, 384 U.S. 436

Petitioner Forbes does not contend that the print media is not free to lie, censor, warp or distort the news and truth in any way that its conscience allows; but petitioner does state and aver that *all* avenues of presenting his ideas to the people were effectively and *de facto* barred in the 3rd district; even though news media *outside the district*, including representatives of *Asahi*, the largest news medium in Japan, who contacted Forbes because *they* believed his candidacy was extremely newsworthy.

Petitioner Forbes respectfully calls the court's attention to the discussion of the fact, unforeseen in 1791, that "in practical terms the newspapers and magazine, like TV and radio, are available only to a select few."
Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2080 at 2114~2116; 412 U.S. at 159~163; and at 2132,33 and 192~196, respectively.

---

fective alternative form of communication or expression:

All of the canons and rationale expounded in the plethora of otherwise sharply divided opinions, concurrences and dissents in *Red Lion* and its progeny by many of the wisest and learned judges and justices, all unite to say in this case;

The constant inroads against the paramount rights of the people, the steady piling of one sided weights in favor of broadcasters and bureaucrats against the rights of the People and of Citizens and Persons who seek to exercise their most precious and fundamental rights, have combined to cause the carefully, precariously balanced law to fall from the tightrope;

And this honorable court has the power and the duty to rescue rule by law by invoking the constitutional safety net.

6. Abridgement of First Amendment Rights by Congress, the FCC, Commercial Licensees, the Courts, the AETN Defendants, or Anyone is *Prima facie* Unconstitutional

*** The ... Defendants cannot hide behind the shameful fig leaf of bureaucratic interpretations.

"I believe there are more instances of the abridgment of the freedom of the people *by gradual and silent encroachments of those in power* than by violent and sudden usurpations."

James Madison,
Speech in the Virginia Convention, June 16, 1788

The ... Defendants use as a pretense for their violations of the Constitution and laws, an unconstitutional usurpation by FCC bureaucrats. But it is mere chicanery that pays hypocritical lip service to the First Amendment while ravishing it.

The FCC misuses *Chisholm v. F.C.C.*, 538 F.2d 349 (1976) as a pretext, an *irrational* 'rationale' to give the state the powers to abridge the paramount Free Speech Rights of the People and of Citizens by *de facto* censoring viewpoints, ideas, expressions and persons. At most, *Chisholm*, the beachhead used for invasions against the People's First Amendment Rights, made debates sponsored by *a non*-licensee, provided further that there is *no evidence of broadcaster favoritism,* exempt from

equal time provisions on *a case-by-case basis.*

In this case, [1] *the sponsor is a licensee.* Moreover, [2] *the sponsor is the state.* And, [3] there is abundant evidence of state *favoritism* on the one hand, and *hostility, unreasonable, arbitrary and capricious discrimination against the petitioner* on the other. And, [4] there is a shameful record of *routine, after the fact, denial by the agency that holds the People's Rights by the throat.*

But the FCC, given an inch by the courts, has taken miles and miles of rights. They have trespassed over the boundary, and once the wall was breached they have encroached on and claimed all the public's domain as their very own until there is no longer a place for the People, the Individual Citizen or for their Rights. They would banish the Law of the Land from the Land, and deny by their response even room for the razor thin paper upon which these rights are written.

The FCC has *unilaterally* exempted political debates sponsored by broadcasters. Free of all fear of restraint they have *ultra vires* included *public* licensees, State agents, in the *nomenklatura,* the exclusive club of Censors and Czars with the power to decide what the people may be permitted, or denied the right, to see and hear.

The State has "attempted to bring evidence before the court" that the FCC has given them *carte blanche* to censor and discriminate by attaching a virtually illegible letter, apparently from the FCC, in which the FCC *says* it has the power to grant the powers of censorship to privileged licensees; and to "prove it," by pseudo-legalistic tautology, the FCC *says* it has the power *because the FCC says* because the FCC says *because the FCC says ... ad infinitum, ad absurdum.*

7. The FCC Interpretations Used by the ... Defendants are Unconstitutionally Broad, Vague and Unconstitutionally Applied

The power to censor and discriminate against candidates and viewpoints based on the subjective "good faith news judgment" of FCC licensees is unconstitutionally vague, incapable of being measured by any objective criteria, is an open invitation to arbitrary, capricious, unreasonable, discriminatory

and viewpoint and/or personality based denial of equal opportunities, rights and facilities. So vague a phrase is equivalent to restricting Free Speech to the pleasure and prejudices of a privileged class, a *nomenklatura* of state licensed censors ...

Paraphrasing the Court:

"Surely no one would seriously suggest that judicial independence would be strengthened *by allowing removal of federal judges only by 'a good faith' determination by a handful of congressional 'experts'* on a special 'Committee to Protect Judicial Independence.'!"

Bowsher v. Synar, 106 S.Ct., at 3190; 478 U.S., at 730.

This abridgement in "good faith" language is not only capable of being applied unconstitutionally, it has in fact been used by the ... defendants to deny the rights of petitioners.

8. The FCC's Claimed Powers are Violative of The Fundamental Principle of Separation of Powers

The FCC's combined powers of [1] *de facto* legislating, [2] executing and [3] judicially interpreting and reviewing and automatically approving its own actions by *post hoc* rationalizations are totally contrary to the spirit and express language of the Constitution and due process Law of the Land.

The People retained their inherent Rights and Powers for themselves and their posterity, with the exception of certain limited powers which they vested and delegated precisely into three separate and distinct branches of the government they created: The Legislative, *Article I*; The Executive, *Article II*; and the Judicial, *Article III*, respectively.

INS v. Chadha, 462 U.S. 919, 951; 103 S.Ct. 2764, 2784; 77 L.Ed.2d 317 (1983)

"It is a fundamental principle in our institutions, *indispensable to the preservation of public liberty,* that one of the separate departments of government shall not usurp powers committed by the Constitution to another department."

Mugler v. Kansas, 123 U.S. 623, 662 {Italics supplied.}

The declared purpose of separating and dividing the powers of government, of course, was to "diffus[e] power *the better to secure liberty.*"

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635; 72 S.Ct. 863, 870; 96 L.Ed 1153 (1953) {Italics supplied.}

Congress has created a nonconstitutional, *de facto* fourth branch of government, the bureaucracy, under the general heading of Independent agencies, of which the Federal Communications Commission, the FCC, is one. Constitutionally, the FCC is neither fish nor fowl, but like an extraconstitutional monster metamorphosing from a mutant proliferation of regulations it has taken and usurped for itself the combined powers of all three branches of lawful government and has *de facto* decreed itself higher than: [1] each; and, [2] all of the three lawful branches of government; [3] the Constitutional contract which created the balanced and limited government; and, [4] The People themselves.

"[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates..." Montesquieu, quoted by James Madison in *The Federalist No. 47*, p. 325 (J. Cook ed. 1961). Cited favorably in *Bowsher v. Synar*, 106 S.Ct. at 3185; 478 U.S. at 722.

"That to secure these {God-given} rights, Governments are instituted among Men, deriving their just powers from the consent of the governed ... the Legislative powers, *incapable of Annihilation,* have returned to the People ..." {Italics supplied.}

The Unanimous Declaration {of Independence} of the thirteen united States of America, In Congress, July 4, 1776.

Legislation to become law must first be properly passed by both Houses and affirmative or passive approval of the President or repassed by two thirds of the members of each House. *Article I, Section 7.*

"Regulations are not the work of the legislature and do not have the effect of the law in theory."

Black's Law Dictionary, Abridged 5th edition, p. 668.

Gradually, **the FCC has usurped legislative powers** and exceeded all lawful authority via so-called rulemaking procedures. These procedures have been so eroded and taken for granted without checks or balances that mere declaratory findings and interpretations, devoid of due process, have the practical effect of legislation.

Congress has no such power to divest itself of nor abdicate its mandated duties by forfeiting this important, cardinal legislative power entrusted to it by the People, who instituted a representative government to secure their innate, God-endowed Natural Rights. The People specifically delegated their legislative powers, which are "incapable of annihilation," to elected representatives who may not abandon, forsake, nor desert the People by surrendering this elemental power to any other.

The FCC has also usurped executive powers because it enforces and interprets both constitutionally enacted legislation and its own pseudo-"legislation."

"Interpreting the law enacted by Congress to implement the legislative mandate *is the very essence of 'execution' of the law.*"

Bowsher v. Synar, 106 S.Ct. 3181 at 3191; 478 U.S. 714 at 733

THE FCC HAS ALSO USURPED JUDICIAL POWERS that *the People have entrusted to the supreme Court and inferior Courts constitutionally established by the Congress.* No Court, and certainly no agency, not even contemplated by the People nor the Constitution, has the lawful authority to deny [a] the People nor any Person their God-given rights; and [b] the equal protections thereof; [c] Due Process; and [d] their Common Law Right to their Day in Court expressly secured by *Section 2 of Article III (& Amendment VII).*

Petitioner Forbes respectfully points out that the inferior courts do not overrule the Supreme Court. And it is well established doctrine that no agent, agency or creature may have powers denied to the higher branch:

Thus, if the king cannot behead an accused unless condemned by jury, surely the mayor, the city councilmen, the municipal judge, the city attorney, the policeman on the beat,

or the sanitation engineer may not either. And, if the king may not abridge free speech, then surely neither the court jester, the FCC nor the ... Defendants may lawfully censor speech either.

Thus the ... Defendants *usurp* powers under color of *not* law, *but bureaucratic permission,* to do what is denied to it by the Constitution. The FCC, ... a mere extra-constitutional agency claims to have tyrannical powers that *the Constitution expressly forbids* to even the three constitutional branches of government.

9. The FCC Claims to Power are *Beyond* Usurpa-

"ETERNAL VIGILANCE IS THE PRICE OF LIBERTY!"
Thomas Jefferson

REMONSTRANCE
By James Madison,
Father of The United States Constitution and Bill of Rights

"The preservation of a free government requires not merely that the metes and bounds which separate each department of power be invariably maintained, but more especially *that neither of them be suffered to over leap the great barrier which defends the Rights of the People.*

"The rulers who are guilty of such an encroachment *exceed the commission from which they derive their authority,* and are tyrants.

"Because it is proper to take alarm at the first experiment on our Liberties; We hold this prudent jealousy to be the First Duty of Citizens and one of the noblest characteristics of the late Revolution.

"The Freemen of America did not wait till usurped power had strengthened itself by exercise and *entangled the question in precedents.*

"They saw all the consequences in the Principle, and they avoided the consequences by denying the Principle. We revere this lesson too much soon to forget it."

Letters and Other Writings of James Madison, Fourth President of the United States, Congress Edition, in 4 Volumes, Philadelphia, 1865

The Defendants and the FCC have "usurped power and strengthened" this usurpation "by exercise *and entangled the question in precedents.*"

tion, *They Are an Extortion to Transmute Our Republic Under Law into a Sneering Tyranny*

"As Usurpation is the Exercise of Power, which another hath a Right to; *so Tyranny is the Exercise of Power beyond Right, **which nobody can have a right to ...***"

John Locke, *The Works of John Locke, Esq.*, In Three Volumes; Of Civil Government, Chapter XVIII, Of Tyranny, p. 199, London, 1714

"Unlimited Power Is Apt To Corrupt The Minds Of Those Who Possess It; And This I Know, My Lords, That *Where Law Ends, Tyranny Begins.*"

William Pitt, *Case of Wilkes. Speech* [January 9, 1770]

"The only prize much cared for by the powerful is power. The prize of the general is not a bigger tent, but command."

Law and the Court, Justice Oliver Wendell Holmes, Jr., 1913

Without effective checks and balances the capacity for self-aggrandizement with all power aggregating into the hands of a *nomenklatura* of privileged licensees and contemptuous bureaucrats, the mere claim to unabridgeable rights for the People by Petitioner Forbes is disparaged as a civil "sin."

"WHERE LAW ENDS, *TYRANNY BEGINS.*"

John Locke, *Second Treatise of Government,* Sec. 202 [1690]

"Power tends to corrupt and absolute power corrupts absolutely." Lord Acton,

Letter to Bishop Mandell Creighton, [April 5th, 1887]

This FCC claim is beyond separation of powers. *It is the raw consolidationof all powers in a virtually unrestrained agency.* Even when acting properly and not violating constitutional rights, the FCC is NOT the Legislature. It is NOT the Executive. *It is NOT the Judiciary*. The FCC was created to protect the People from the unregulated power of broadcasters, not to conspire or to be misused to deprive the People of their God-given rights.

The Rights to Freedom of Speech, to express and to hear, all

political Rights are secured under the First Amendment. The Fourteenth Amendment guarantees equal protection of the laws. The Common Law Rights to Justice and Juries are implied and expressed throughout our Constitution and the Law of the Land. So-called "administrative remedies" may not deny First Amendment Rights and Equal protections, and then deny due process and right to redress in the courts and trial by jury.

Neither the FBI, the CIA, nor any other federal law enforcement agency has lawful authority to give state officials permission to murder or assassinate citizens. Neither does the FCC have the lawful authority to give (defendants) permission to assassinate rights protected by the First Amendment.

For the State Defendants or any private persons or entities to claim that an unelected regulatory agency in Washington D.C. has been delegated powers to give them license to deprive the People and/or any Citizen of their Rights and their Rights to Equal Protection of the Laws and their Day in Court is *prima facie* intolerable.

Furthermore, it is a violation of Due Process.

* * *

Statement Of Separation, Usurpation & Tyranny
Questions Presented

Does the court defend the doctrine of inherent separation of powers from *ultra vires* usurpations?

And does it limit agencies of public power from tyrannically arrogating powers expressly denied to any agency or arm of government whatsoever?

"Necessity is the plea of every infringement of human liberty; it is the argument of tyrants; it is the creed of slaves."
William Pitt

It may make it easier on Congress, whose individual members fear the power of a united and hostile association of media, to look the other way when the FCC operates in total contempt and opposition of congressional intent; but that does not make it right or lawful.

Petitioner herein incorporates *the entire dissenting Opinion of the honorable Circuit Judge J. Skelly WRIGHT* in *Chisholm*, 358 F.2d at 366~396, and respectfully requests this honorable Court to consider its inescapable logic in its deliberations.

It may may be convenient for Congress to avoid its duties and responsibilities, and it may lessen the load on our overworked courts if the courts simply go along with the fiction that the FCC has the powers to do whatsoever pleases the licensee broadcasters and that the FCC procedures are "fair and adequate" because the FCC evaluates itself and finds itself above and beyond reproach; but:

"... the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives - or the hallmarks - of democratic government..."

I.N.S. v. Chadha, 462 U.S., at 944;
103 S.Ct., at 2781; 77 L.Ed.2d 317 (1983).

Petitioner respectfully suggests that *the workloads and calendars of the courts will be saved from perpetual petitions from Citizens whose rights have been violated* if this Court will courageously do its duty and clearly and unambiguously protect the First Amendment Rights of the People and of individual candidates and viewpoints from the censorship and suppression by bureaucrats and licensees under color of bureaucratic decrees and Orwellian double-think.

The history of the convoluting of the letter and intent of regulation of privileged licensees to abridge the essential right to Freedom of Speech into an unrecognizable mockery is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over the People.

* * *

"As Justice STEVENS observed in *Consolidated Edison Co. v. Public Service Comm'n. of N.Y.*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980), however: 'A regulation of speech that is motivated by nothing more than a desire to curtail ex-

pression of a particular point of view on controversial issues of general interest is the purest example of a "law ... abridging the freedom of speech, or of the press." A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.' *Id.*, at 546, 100 S.Ct., at 2333-2334 ... '[t]he First Amendment's hostility to content based regulation extends not only to restrictions on certain viewpoints, but also to prohibition of public discussion of an entire topic, *id.*, at 537, 100 S.Ct., at 2333, we must particularly wary in assessing [restrictions of speech] to determine whether it reflects an impermissible attempt 'to allow a government [to] control ... the search for political truth.' *Id.*, at 538, 100 S.Ct., at 2333."

FCC v. League of Women Voters of California, 104 S.Ct. at 3119-3120

* * *

13. THE PUBLIC'S PARAMOUNT RIGHT TO KNOW

"... Congress may ... seek to assure that the public receives through this medium a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations."

FCC v. League of Women Voters of California, 104 S.Ct. at 3116

"... those who are granted a license to broadcast must serve in a sense as fiduciaries for the public by presenting 'those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.' *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 at 389, 89 S.Ct. 1794 at 1806, 23 L.Ed.2d 371 (1969).

"As we observed in *(Red Lion)* because '[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail ... the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences [through the medium of broadcasting] is crucial here [and it] may not be constitutionally abridged either by Congress or by the FCC.'

Red Lion, 395 U.S. at 390, 89 S.Ct. at 1806." 104 S.Ct. at 3116

* * *

There is a "substantial government interest" in ensuring adequate and balanced coverage of public issues.

FCC v. League of Women Voters of California, 104 S.Ct. at 3116

The public has a "First Amendment interest in receiving a balanced presentation of views on diverse matters of public concern." *FCC v. League of Women Voters of California,* 104 S.Ct. at 3117

"Similarly, in *CBS, Inc. v. FCC,* 453 U.S. 367, 101 S.Ct. 2813, 69 L.Ed.2d. 706 (1981), the Court upheld the right of access for federal candidates imposed by § 312(a)(7) of the Communications Act both because that provision 'makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process,' *id.,* 453 U.S., at 396, 101 S.Ct., at 2830 ... and of guarding against 'the risk of an enlargement of Government control over the content of broadcast discussion of public issues.' " *Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com.*, 412 U.S. at 123-125, 93 S.Ct. 2080 at 2096-2097 (1973)

"As we recently reiterated in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 102 S.Ct. 3409, 73 L.Ed.2d 1215 (1982) 'expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values." ' *Id.,* at 913, 102 S.Ct., at 3426 (quoting *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed.2d 263 [1980]). And we have emphasized:

> 'The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment ... Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'

Thornhill v. Alabama, 310 U.S., at 101-102, 60 S.Ct., at 744.

"'... Debate On Public Issues Should Be Uninhibited, Robust And Wide-Open.' *New York Times Co., v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)" cited in *FCC v. League of Women Voters of California,* 104 S.Ct. at 3118

* * *

"Congress was, however, cognizant of the fact that the Nation's airwaves are a public resource not subject to private ownership." *Muir* at 1039

"... [T]he People as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment." *Red Lion,* 395 U.S. at 390; 89 S.Ct. at 1806.

"[S]peech Concerning Public Affairs . . .
Is The Essence Of Self-Government."
Garrison v. Louisiana, 379 U.S. 64, 74-75; 85 S.Ct. 209, 216; 13 L.Ed.2d 125 (1964)

The First Amendment must therefore safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view. See, e.g., *Thomas v. Collins,* 323 U.S. 516, 537; 65 S.Ct. 315, 325; 89 L.Ed. 430 (1945); *cf,. NAACP v. Button,* 371 U.S. 415, 429-430; 83 S.Ct. 328, 335-337; 9 L.Ed.2d 405 (1963)

[I]t is imperative that we take special care to preserve the vital First Amendment interest in assuring 'self-fulfillment [of expression] for each individual.'
Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96; 92 S.Ct. 2286, 2290; 33 L.Ed.2d 212 (1972)

Even for commercial licensees who have an interest in exercising reasonable journalistic control over the use of their assigned frequencies, nevertheless,

"The Right Of Free Speech Of A Broadcaster . . .
Does Not Embrace A Right To Snuff Out The Free Speech Of Others." {Emphasis added}
Red Lion, 395 U.S., at 387, 89 S.Ct. at 1805.

"No Man In This Country Is So High That He Is Above The Law. *All The Officers Of The Government, From The Highest To The Lowest, Are Creatures Of The Law, And Are Bound To Obey It.*" *U.S. v. Lee*, 106 U.S. 196

Therefore, Right and Justice and the Constitution should not be trampled by trivial technicalities and entangling precedents or bureaucratic interpretations that are merely *Curia Regis,* an unlawful usurpation of the judicial powers conferred by the People to the lawful courts. The People and Plaintiffs and their rights must not be abandoned to the tender mercies of death trap bureaucratic schemes.

It Is A Common Law Maxim That Everyone Shall Have A Remedy For An Injury Done To His Person Or Property.

The common law right to a jury trial is explicitly embodied in the Sixth and Seventh Amendments to the United States Constitution.
Gannett C. v. De Pasquale, 99 S.Ct. 2898; 61 L.Ed.2d 608 (1979)

Under the Federal Rules of Civil Procedure *there is no longer any procedural obstacle to the assertion of legal rights before juries, however the party may have acquired standing to assert these rights.* [Italics added]
Rose v. Bernhard, 396 U.S. 531; 90 S.Ct 733; 24 L.Ed.2d 729

The word "legal" as used in statutes, is a term of art; in situations in which "legal" relief is available and "legal" rights are determined, the Seventh Amendment provides a right to jury trial. *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575; 98 S.Ct. 866; 55 L.Ed.2d 40

A plaintiff may opt for a jury trial in an action founded upon *Bivens v. Six Unknown Fed Narcotics Agents*, 403 U.S. 388; 29 L.Ed.2d 619; 91 S.Ct. 1999, in which it was recognized that in some circumstances the victims of a violation of the Federal Constitution ... have a right to recover damages ... in federal court *despite the absence of any statute conferring such a right.* [Italics added]
Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468; 64 L.Ed.2d 15

The Declaratory Judgment Act (28 USC §§ 2201, 2202) *specifically preserves the right to jury trial.* [Italics added]
Beacon Theatres Inc. v. Westover, 359 U.S. 500; 79 S.Ct. 948; 3 L.Ed.2d 988

Free Speech, Free Of Government Censorship And Discriminatory Trespasses, *Is Irrepealable Law*

"The founders of our government were familiar with the history of the struggle for liberty and they made secure in a written Constitution every right ... Time has proven the discernment of our ancestors; **for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now* after the lapse of more than seventy years {or 200 years}, sought to be avoided.**

"Those great and good men foresaw that troublous times would arise ... and that the principles of Constitutional liberty would be in peril, unless established by *irrepealable law*. The history of the world had taught them that what was done in the past *might be attempted in the future*. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of protection *all* classes of men, at *all* times, *and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be *suspended* during any of the great exigencies of government {or by innocuously appearing "policy matters"}. Such a doctrine leads directly to anarchy *or despotism* ...

Wicked men, ambitious of power, with hatred of liberty *and contempt of law,* may fill the place once occupied by Washington and Lincoln ... **Our fathers knew that *unlimited* power was especially hazardous to freemen."**
Mr. Justice DAVIS, in *ex parte Milligan*, 4 Wall 2 (118) (1866)

- III - THIS APPEAL IS NOT MOOT

Johnson v. FCC, 829 F.2d. 157 (D.C. Cir. 1987), cited by the State, is another case in which it was found that *notwithstanding the fact the election was over,* challenge of minority party party presidential and vice-presidential candidates to

their exclusion from televised debates was not moot, *as it was case where controversy was capable of repetition yet evading review.* See also *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 at 125

This case, *Johnson,* took strongly into consideration [1] the Fairness Doctrine, *which the FCC has since revoked;* and [2] the fact that in this case *the sponsor was not a broadcaster,* but a third party; thus, this case also upholds Petitioners and vanquishes the State's defense.

Throughout all the cognate lines of cases, the courts have reiterated over and over again *the necessity of "case-by-case inquiry"* because of the inherent complexity of balancing rights as the courts attempt to "walk the tightrope" *"in the light of the particular circumstances of each case."* {Italics added}

e.g., Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2080 at 2121 (1973)
FCC v. League of Women Voters of California, 104 S.Ct. 3106

> 'We can not allow any single person or group to place themselves in [a] position where they can censor the material which shall be broadcasted to the public, nor do I believe that the Government should ever be placed in the position of censoring this material.' *Hearings on H.R. 7357 before the House Committee on the Merchant Marine and Fisheries, 68th Cong., 1st Sess., 8 (1924).*

"That statement foreshadowed the 'tightrope' aspects of Government regulation of the broadcast media, a problem the Congress, the Commission, and the courts have struggled with ever since...

Columbia Broadcasting Sys. Inc., v. Democratic Nat. Com., 93 S.Ct. at 2087-88, 412 U.S. at 105

* * *

And while strangling the First Amendment with the frayed remnants of this tightrope, the ... Defendants have the effrontery to argue that these twin evils are "justified" by the very tightrope balancing act that was developed *to prevent this evil misuse of the people's airwaves.*

No matter how well intentioned and reasoned; based on facts *that no longer exist* {*i.e.*, the FCC's broken promise of perpetuating the Fairness Doctrine}, petitioner contends that the overall effect of the trend of the decisions, accelerated by a voracious interpretation by broadcasters and certain persons in the FCC, is that we are rapidly sliding down a slippery slope to a point of no return, in which the People and individual Citizens will have no rights; so it is the imperative duty of the Court to wield the constitutional lifeline to save the American People from falling to their doom.

B. This case is not moot, also, because patently preposterous denials of Free Speech and Equality before the law is subversive of public respect for the courts, and the Supreme Court now gives this factor great weight. The public's confidence in the courts to preserve a constitutional Republic will be undermined, if the People in their common sense and instinctive sense of justice and fairness perceive the Court to be swallowing camels while choking on gnats: If the burning of American Flags, the imagery of religious symbols immersed in urine, etc., are expressions protected by the First Amendment; **then *why* may (defendants) deny the People their right to hear the only popularly enfranchised candidate for U.S. Congress ...?**

* * *

"The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to desire what it demands.

"... Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

"... If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern for legitimacy is not for the sake of the Court but for the sake of the Nation to which it is responsible."

Opinion of Supreme Court of The United States in Planned Parenthood of Southeastern Pennsylvania, et al., v. Casey, Governor of Pennsylvania, et al., No.s 91-744 & 91-90, at 23-24, 26

* * *

- IV - THE INESCAPABLE CONCLUSION

WHEREFORE, BECAUSE [1] The Constitution is the Supreme Contract it is Controlling, and [2] The Rights of The People are Paramount, [3] the Constitution may not be overruled; nor the Rights of the People be abridged, nor Denied by Any Rule or Precedent ...

And, [4] because *DeYoung,* and all of the precedents cited by ... Defendants to abridge First Amendment Rights, have been *factually* and *de jure* reversed, and fatally invalidated by the FCC's own unilateral reversal of the Fairness Doctrine;

And, [5] because of prohibited ... Prejudice and Hostility;

And, [6] because there is no effective "comprehensive administrative scheme" to protect the federal rights conferred by 47 USC 315;

And, [7] because The Scales of Justice have been Unbalanced by the deprivation of: (A) The Fairness Doctrine; (B) Unrestricted access to buy time; (C) And, alternate means of presenting views;

And, [8] because the Abridgement of First Amendment Rights by Congress, the FCC, Commercial Licensees, the Courts, the AETN Defendants, or Anyone is *prima facie* Unconstitutional;

And, [9] because the FCC Interpretations used by the ... Defendants are *prima facially* Unconstitutionally Broad, Vague; and, [10] Unconstitutionally Applied in this instance;

And, [11] because the FCC's Claimed Powers are Violative of The Fundamental Principle of Separation of Powers;

And, [12] because the FCC Claims to Power are Unconstitutional;

* * *

And, [16] because of the Public's Paramount Right to

Know ... (all rules) that abridge the rights protected by the First Amendment must be overruled;

And, [17] because it is far past time to reverse the menacing trend of diluting, giving up and losing fundamental rights. It is time to reverse and right the wrongs that violates and perverts the *inviolate* Law of the Land; and have eroded and dissipated our most basic rights to the point where state officials (and privileged licensees with affirmative fiduciary duties) may contemptuously deny the People their right to be informed, to censor the viewpoints and ideas of a popularly nominated candidate and blatantly discriminate against persons, ideas and classes they oppose.

This Appeal is Not Moot because [1] *it is a case where controversy is capable of, and doomed to repetition, yet evading review.*

And this case is not moot because [2] the public's confidence in the courts to preserve a constitutional Republic will be undermined if the protections commonly understood to be be afforded by the First and Fourteenth Amendments are abridged by the courts.

Therefore, for each and all of the foregoing reasons *DeYoung* (and the December 16, 1992, order of the district court) must be reversed as to any effects that abridge rights secured by the First Amendment and/or deprives or denies any person the equal protections of the laws;

And this honorable Court has the imperative, affirmative duty to correct the course ~ to prevent our ship of state from sailing off the guarded course of a popular Republic under law into harms way, the hazardous deadly seas of an imperial, totalitarian statism ~ by fashioning appropriate and effective remedy;

Wherefore, appropriate and effective remedy to prevent further damage to the People, to the Republic, to the Constitution, to Petitioner Forbes and to all other candidates who may come after is required from this honorable Court.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes, Plaintiff
In his own proper person,

Box 88
London, AR 72847
501/293-4641

AFFIDAVIT OF VERIFICATION OF FACT

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 7 Day of s/ December, 1992.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 16 th Day of December, 1992, by U.S. mails.

Mr. Thomas S. Gay, #77053
Senior Assistant
Attorney General
For AETN State Defendants
200 Tower Building
323 Center St., Ste. 200
Little Rock, AR 72201
501/682-2007

Mr. Robert L. Jones, III, #69041
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APPENDIX V

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 93 -1031 -WA

Ralph P. Forbes And The People
Appellants,
v.
Arkansas Educational Television Communications Network Foundation, Et Al.,
Appellees.

On Appeal from the United States District Court for the Western District of Arkansas

APPEAL FROM "ORDER TO DISMISS"

> **"Those then, who controvert this principle, that the Constitution is to be considered in court as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.**
>
> **"This doctrine would subvert the very foundation of all written constitutions."**
>
> *Marbury v. Madison*, 5 U.S. 137 at 176, 1 Cranch 37, 163, 2 L.Ed. 60 (1803)

* * *

May it please the Court, comes Ralph P. Forbes plaintiff/appellant and appeals from the Order of the United States District Court, Western District of Arkansas, Fort Smith Division, Civil No. 92-2190, dated December 16, 1992, for each and all of the following reasons and for each and all of the reasons in petitioner's separate *Brief* re the unconstitutional results of *DeYoung v. Patten,* 898 F.2d 628 (8th Cir. 1990)

1.

The District Court Did Not Have Jurisdiction To Dismiss.

"This case [92-3374WAFS] is before us on petition for rehearing." The Order and Opinion, of the Eighth Circuit Court, remanding the case back to the district court to "determine the case and enter final judgment," was not issued until December 22, 1992, *six days after* the district court's "final order."

This over eagerness to dismiss by the district court is more than a matter of comity. The jurisdiction of the Circuit Court precluded and preempted the untimely order. Courts have found both election law and FCC questions not moot, because capable of review. e.g., *Johnson v. F.C.C.*, 829 F.2d 157 (D.C. Cir. 1987). This premature dismissal would have been a procedural predicament if some meaningful relief could have been fashioned, or if *DeYoung* had been reversed. The district court erred in disregarding plaintiff's answer to motion to dismiss pointing out that the case had been removed to the Clerk of Court for the Eastern District of Arkansas *and the case was before the 8th Circuit Court.*

The premature order dismissing the case with prejudice was predicated on the district court's analysis that "*DeYoung* was binding precedent and dispositive of the matter." Contrary to this, the 8th Circuit Court's Order of December 22, 1992, a week *after* the order appealed from, instructed the district court to "vacate its order, denying preliminary injunctive relief on the merits, and to enter a new order, denying the motion for preliminary injunction as moot."

Because "The underlying case is not moot."

If these instructions to the court below have been followed plaintiff has not received copies of the order to vacate nor the new order.

* * *

Plaintiff appealed immediately. Plaintiff is still recovering from the costs of the campaign, and unfortunately was compelled to apply for leave to proceed in forma pauperis. The district court denied petition on grounds this appeal was "not taken in good faith."

Where indigent plaintiff inmate presented nonfrivolous claim, denial of in forma pauperis status or similar relief for no apparent reason rendered otherwise adequate postdeprivation remedy inadequate, so that inmate should be permitted

to pursue 42 USC § 1983 action on merits.
Williams v. St. Louis County, (1987, CA8 Mo) 812 F.2d 1079
Jones v. Morris, (1985, CA7 Ill) 777 F.2d 1277
Johnson v. Kempf, (1986, CA11 GA) 781 F.2d 1570
Nilsson v. Coughlin, (1987, SD NY) 670 F.Supp. 1186

2. All the reasons the court below gave for dismissal in its five page, single spaced letter to the parties, dated December 16, 1992, were erroneous.

Petitioner requested an opinion of the court with his notice of appeal:

"PLEASE TAKE NOTICE Plaintiffs in the above styled matter intend to appeal the Order of December 16, 1992. Pursuant to the right to appeal and due process Petitioner-in-chief requires a particular and sufficient *finding of fact and conclusion of law* from Judge H. Franklin Waters."

No such particular and sufficient finding of fact and conclusion of law has been provided. All that petitioner has to base his appeal on is this somewhat vague, conclusory, five page rationalization, which apparently is meant to be a *de facto* opinion. It is a veritable Procrustean bed on which plaintiff's cause must fit the prejudged doom; if the law or the facts are too short, stretch them, if they are too long, chop them off. Petitioner does not know if this letter has the force of law, but he believes he has no choice but to first point out the various misconceptions and errors in the letter, *leading up to the crux of the matter on which all decisions and appeals must ultimately be decided.*

3. The court below erred when it failed to liberally construe the pleadings.

* * *

Pro Se complaints, according to the Supreme Court, are held "to less stringent standards than formal pleadings by lawyers..."
Haines v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594
Rehearing Denied 405 U.S. 948, 30 L.Ed.2d 918, 92 S.Ct. 963

"The election is approximately two weeks from the filing of this case. Plaintiff Forbes is campaigning night and day. But the blatant transgression against the people and Forbes by AETN has left Plaintiff Forbes *no option but to turn to this court to protect his rights, the rights of the voters and the integrity of the electoral process.*"

(Original "Emergency Complaint Against Bureaucrats & Politicians," p.2)

Former congressional candidate presented a justiciable claim under 42 USC 1985(3) where it was alleged that state agents violated his constitutional rights to engage in political activities and the rights of voters within plaintiff's district to exercise their electoral rights without being target of deceptive or illegal practices by governmental agents.

Lowenstein v. Rooney, (1975, ED NY) 401 F.Supp. 952, 21 FR Serv 2d 12

In his Answer to the Motions to Dismiss, Petitioner Forbes averred he is:

[4.] ... a layman untrained in law who was forced to take invaluable time in the midst of a political campaign and work around the clock to prepare the first version of the pleadings, *which of necessity were not in a final version;* prepare appeals for a one judge hearing, a three judge panel and the appellate court *en banc.* And prepare a second version of the pleadings *under emergency conditions* in which priceless rights needed to be protected under powerful and limited time constraints.

5. It was the actions of the Defendants that are the *casus belli* that necessitated this complaint. Time was of the essence of prevent irreparable injury, therefore it was the actions of the AETN and KHBS-TV Defendants that forced Plaintiff Forbes to take immediate, *even if incomplete, defensive process in order to prevent the irreversible ravagingof the innumerable, priceless rights endangered by the Defendants.*

6. Plaintiffs have cause of action pursuant to the United States Constitution Article I. Section 2; Article III, Section 2; Article IV, Section 4; Article VI; And Amendments I, VII, IX, X and IVX, thereto; *42 USC 1981*, et seq.

7. Plaintiff exhausted all reasonable and lawful administrative remedies. Moreover, important constitutional questions re these so-called administrative remedies are *presently* before the appellate court.

Under Fed.R.Civ.P. 8, technical niceties of pleading are not required. Rather a short and plain summary of the facts sufficient to give fair notice of the claim asserted is sufficient.
Conley v. Gibson, 355 U.S. 41,47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)

"... the district court had no jurisdiction to dismiss case for failure to state a cause of action *** without hearing the plaintiffs ***."

Gutensohn v. Kansas City Southern Ry.Co.,
140 F.2d 950, 933 (8th Cir. 1944)

In 42 USCS §§ 1983 cases involving alleged violation of express substantive constitutional right, it is only necessary to allege that there was a deprivation of constitutional right under color of law ... (general rule)

Pro se plaintiff who does not refer to 42 USCS §§ 1983 in complaint, who mentions Fourteenth Amendment only briefly, and who relies exclusively on Title VII (42 USCS §2000e et seq.) on appeal should nonetheless be allowed opportunity to pursue claim under § 1983 and Fourteenth Amendment where, liberally construed, complaint does state claim for relief.

Haddock v. Board of Dental Examiners, (1985 CA9 Cal) 777 F.2d 462, 39 BNA FEP Cas 764.
Radcliff v. Landau, (1989, CA9 Cal) 883 F.2d 1481, clarified (CA 9) 1989 U.S. Ap LEXIS 17364
Cahill v. Carroll, (1988, ED Pa) 695 F.Supp. 836
Grattan v. Burnett, (1983, CA4 Md) 710 F.2d 160
Rubin v. O'Koren, (1980, CA5 Ala) 621 F.2d 114

Complaint by pro se plaintiff should have expansive reading and be held to less stringent standard than pleadings drafted by attorneys.

Cruz v. Cardwell, (1973, CA8 Mo) 486 F.2d 550
Byrd v. Stewart, (1987, CA11 Ga) 811 F.2d 554
Baily v. Wictzack, (1990, MD Fla) 735 F.Supp. 1016

Nance v. Kelly, (1990, CA2 NY) 912 F.2d 605

Any plaintiff who can allege deprivation of federal right by reason of action under color of law can maintain action under this sub-chapter.

Nationwide Amusements, Inc. v. Nattin, (1971, DC La) 325 F.Supp. 95

"The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot *** The right to a hearing on the merits of a claim over which the court has jurisdiction is of the essence of our judicial system, and the judge's feeling that the case is probably frivolous does not justify by-passing that right."

Harmon v. Superior Court, 307 F.2d 796 (1962)
Addison v. The Grand Lodge of International Association of Machinists, 300 F.2d 863 (9 Cir. 1962)
Russell v. United States, 306 F.2d 402 (9 Cir. 1962)

This section making any person who, under color of law deprives U.S. Citizen of constitutional rights, liable to injured party is to be construed liberally.

Nanez v. Ritger, (1969, DC Wis) 304 F.Supp. 354

Pleadings should be construed liberally in favor of the pleader. The theory of the complaint is to be determined by its main and material allegations. A pleading is judged by its substance and not its form. Actions erroneously brought under inappropriate law may be transferred.

United States v. White County Bridge Commission, 275 F.2d 529 (7th Cir. 1960)

If a very flawed complaint in a civil action for maintenance of a bridge instituted by the United States Attorney can be restored and won by appellate reconstruction, then surely a pro se complaint alleging violations striking at the heart of the most precious, vital and fundamental constitutional rights must not be strangled by a narrow bias against petitioner and his cause.

4. The court below erred when it failed to recognize that "42 USC 1981, *et seq.*," were intended to mean §§

1983 and 1985 allegations

"et seq. = Latin *et sequens* = and the following; Latin *et sequentes, et sequentia* = and those following;"
The American College Dictionary, Random House, 1969 ed.

Plaintiff, because of failure to enforce his rights by either the AETN defendants or the FCC "administrative protectors," was forced to write his original complaint during the week end of October 17-18th. Because of the demands of his campaign, etc., he was forced to "wing it," to work around the clock, without benefit of research, law library, etc. Plaintiff knew that the statutes he invoked were "somewhere" in the so-called "Reconstruction," or "Ku Klux Klan" or "Civil Rights" acts aka "1981, et seq." Clearly, the pleadings did not allege racial discrimination, but violations under color of law {§ 1983}; and violations which are protected against even private conspiracies {§ 1985}. At all times plaintiff made it clear that he needed an opportunity to amend complaint.

The court below should have measured the Complaint against the appropriate sections, rather than "1981."

Or, in the alternative, if a strict, narrow reading is held; the prejudice against pleading should not be bar to new action against defendants for same violations and injuries under applicable statutes.

Denial of leave to amend complaint to allege violation of § 1983 rather than § 1985 was error. It should have been granted, not withstanding unjustified delay, where rejection of amendment would preclude plaintiff from being heard on merits on facts which were well known to all parties and which were pleaded at outset although relief was erroneously sought under § 1985, and defendant would only be lightly prejudiced.

Moore v. Paducah, (1986, CA6 KY) 790 F.2d 557
White v. Bond, (1983, CA8 Mo) 720 F.2d 1002
Gordon v. Leeke, (1978, CA4 SC) 574 F.2d 1147, cert den 439 U.S. 970, 58 L.Ed2d 431, 99 S.Ct 464
Triplett v. Leflore County, (1983, CA10 Okla) 712 F.2d 444, 36 FR Serv 2d 1257

Lundt v. Hodges, (1985, ND Iowa) 627 F.Supp. 373
United States v. ex rel. Smith v. Heil,
(1970, ED Pa) 308 F.Supp. 1063
Richmond v. McElyea, (1990, ED Tenn) 130 FRD 377

5. The Court Below Erred When It Failed To Grant Leave And Sufficient And Ample Time For Plaintiff To Amend The Pleadings.

"10. Plaintiff Forbes apologizes to the court for the hasty manner in which this complaint had to be prepared, and *he begs leave to amend this pleading* by being more particular in the multitude of invasions of rights by the defendants and the continuing violations of *42 U.S.C. 1981*, et seq."

{Original "Emergency Complaint Against Bureaucrats & Politicians," pp.4-5}

"This Complaint embraces and must comprehend a long string of abuses and *pattern of continuing conspiracy against the people and their rights*. The instant case against KHBS-TV, et al, as more fully shown is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their informed consent. And therefore, Petitioner Forbes requires at least thirty (30) days past the election of November 3rd to adequately prepare his pleadings and he stipulates that no defendant is required to answer the complaint until after they have received *the fully amended pleadings;*"

{Amended Complaint, emergency addition of KHOG Defendants, p. 7}

"1. The Motions to dismiss are premature because *the Complaint itself has not been amended to include all of the Plaintiffs and Defendants and causes of Action* as stated in the emergency pleadings and in the supplementary emergency pleadings joining the KHBS-TV Defendants."

Plaintiff's Answer to Motion to Dismiss

Dismissals should not be applied so as to subvert *liberal policy favoring amendment of complaints as expressed in FRCivP Rule 15(a)*, and consideration should be given for im-

portant policies that pro se litigants not be denied opportunity to state civil rights claims because of technicalities, and that litigation where possible should be decided on merits.

Kaufman v. Moss, (1973, CA3 Pa) 420 F.2d 1270, cert den 400 U.S. 846, 27 L.Ed2d 84, 91 S.Ct 93

University graduate student who brought pro se 42 USCS § 1983 claim alleging sex discrimination by university should be fairly freely afforded opportunity to amend complaint, *even if request was made after court entered judgment dismissing original complaint.*

Bobal v. Rensselaer Polytechnic Inst., (1990, CA2 NY) 916 F.2d 759, 16 FR Serv 3d 431, amd, on reh (CA2) 1990 U.S. App LEXIS 18658

District Court abused its discretion in dismissing sua sponte group of 42 USC § 1983 claims against police officers in their official capacities without giving plaintiffs opportunity to amend complaints.

Perez v. Ortiz (1988, CA2 Conn) 849 F.2d 793
Lundt v. Hodges, (1985, ND Iowa) 627 F.Supp. 373
Salahuddin v. Cuomo, (1988, CA2 NY) 861 F.2d 40
Cunningham v. Ward, (1976, CA2 NY) 546 F.2d 481

Second amended complaint will not be dismissed pending leave to amend.

Del Signore v. McKeesport, (1988, WD PA) 680 F.Supp. 200
Partridge v. Two Unknown Police Officers, (1986 CA5 Tex) 791 F.2d 1182

Denying §1983 plaintiffs leave to amend complaint was error.

Stevens v. Gay, (1986, CA 11 Ga) 792 F.2d 1000
Rose v. Bartle, (1989, CA3 Pa) 871 F.2d 331
Hill v. Shelander, (1991, CA7 Ill) 924 F.2d 1370, reh den, en banc (CA7) 1991 U.S. App LEXIS 4798

Letter by pro se inmate to judge in 42 USCS § 1983 action should have been broadly construed as as amendment to complaint.

Pearson v. Gatto, (1991, CA7 Ill) 933 F.2d 521
Haley v. Dormire, (1988, CA8 Mo) 845 F.2d 1488

Leave to amend complaint should be freely given when justice requires, particularly in case of pro se civil rights plaintiff who has not had benefits of discovery.

Mathis v. Clerk of First Dept., Appellate Div. (1986, SD NY) 631 F.Supp. 232

Plaintiff will be allowed to amend her complaint to, inter alia, add claim under 42 USC 1983 and to increase *ad damnum* clause, despite plaintiff's delay of three months between the time she filed her complaint and time she moved to amend.

Gordon v. New York State Dormitory Authority, (1983, SD NY) 565 F.Supp. 143

6. The Court Below Erred When It Failed To Apprehend The Claims And Differentiate Among Named And Unnamed Defendants

The Complaint which alleges: "*a systematic and general conspiracy* by the Defendants, under color of law, to deny the Plaintiffs and all American Citizens their basic Constitutional Rights by unlawfully changing this constitutional Republic of Law into a soviet-like dictatorship in which *party bosses, bureaucrats, and powerful special interests* shall alone have the power to decide who may or may not run for elective office; and to deny the American People their fundamental Rights protected by the First Amendment by censoring ideas and opinions that do not conform their own plans a for post-American 'new world order.' "

... Uses phrases such as "The Defendants have continuously conspired to deprive ...;" and, "Certain of the defendants conspired" to show that unknown and named defendants acted individually, together and with others to deprive plaintiffs of their rights to constitutional government in a general pattern of deprivations over the years sufficiently alleges conspiracy. *Kwoun v. SE Missouri Professional Standards Review Organization,* (1985, ED Mo) 632 F.Supp. 520, later proceeding (ED Mo) 632 F.Supp. 1091, affd (CA8 Mo) 811 F.2d 401, cert den (US) 100 L.Ed2d 226, 108 S.Ct. 1994

The style of the case, which described unnamed defendants as "Crooked Lying Politicians," the "Special Interests,"

and certain Media 'Personalities' and the Orwellian Bureaucrats of AETN and Governor Clinton, as a necessary party, in which the AETN defendants were specifically named for their discriminatory exclusion of plaintiff, should have made it self evident that the charges of massive, discriminatory targeted, illegal closings of polling places required by law to be open in 1990, were not alleged against AETN defendants, but certain unnamed "crooked lying politicians."

Petitioner's colorful appellations made in the heat and immediate threat against his most precious and vital rights should not be used to demean or negate the seriousness of the charge.

"The Sixth Circuit has held, and we agree, that the right to cast a ballot in a state election is also protected from interference from private conspiracies by the federal Constitution. *Cameron v. Brock,* 473 F.2d 608, 610 (6th Cir. 1973); see also *Reynolds v. Sims,* 377 U.S. 533, 554, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); *Smith v. Cherry,* 489 F.2d 1098, 1100-1101 (7th Cir. 1973)."

Means v. Wilson, 522 F.2d at 838 (8th Cir. 1975)

7. The court below erred when it failed to *sua sponte* protect the rights of plaintiff, the people and the substantive constitutional questions raised.

Rules of court are procedural and should not be construed to impair the rights of litigants as to substantive rights and law.

28 USC 2072

The court below should have been perpetually protective of pro se litigant's rights, and to be on guard to forewarn him of any procedural or technical errors by him that would place the basic relief prayed in his case in jeopardy.

"It is the duty of the courts to be watchful for the ... rights of citizen, and against any stealthy encroachments thereof. Their motto should be *obsta principiis*."

Hale v. Henkle, 201 U.S. 43 at 88

Boyd v. US, 116 U.S. at 635

Black's Law Dictionary defines the Latin motto, *obsta principiis,* to mean to "Withstand at the beginning; resist the first approaches or encroachments."

{2nd Edition, 1910, at 845; 5th Edition, 1979, at 972}

Dismissal with prejudice of pro se 42 USC § 1983 action was abuse of discretion, and written notice of dismissal on merits should have been given before case was dismissed.

Palmer v. Decatur, (1987, CA7 Ill) 814 F.2d 426
Elliott v. Bronson, (1989, CA2 Conn) 872 F.2d 20
Reynolds v. Shillinger, (1990, CA10 Wy) 907 F.2d 258

District Court improperly dismissed complaint of pro se plaintiff under 42 USC 1983 where plaintiff had twice amended complaint on his own initiative, where court did not advise plaintiff in what respects second amended complaint was deficient, nor did court allow plaintiff leave to amend, and where it was not absolutely clear that plaintiff could not amend complaint to allege constitutional violations.

Noll v. Carlson, (1987, CA9 Cal) 809 F.2d 1446
Karim-Panahi v. Los Angeles Police Dept., (1988, CA9 Cal) 839 F.2d 621

District court must be sensitive to problems of pro se plaintiff in civil rights actions and not too quick to dismiss complaint for failure to state technical cause of action.

Martin v. Wainwright, (1976, CA5 Fla) 526 F.2d 938

8. The Court Below Erred When It Said, "Forbes['] Right To Participate In Televised Debates And Air Political Advertisements Stems *Entirely From ... 47 U.S.C. § 315(a)*"

"The privileges and immunities of citizens of the United States, protected by the XIVth Amendment, are those arising out of the essential character of the federal government, and granted or secured by the Constitution; and due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to the arbitrary exercise of the powers of government."

Duncan v. Missouri, 152 U.S. 382

Plaintiff's rights arise from and are rooted in God-given, inherent, natural, indefeasible rights protected by the United States Constitution, Amendments I & XIV, et seq.

The defendants' duties stem in part from the equal time provision of the Federal Communications Act as well as in in numerous other provisions cited by plaintiff in his submissions.

In addition to § 315 KHOG defendants are implicated by Section 312(a)(7) of the Communications Act of 1934, strong case law, *CBS v. FCC*, etc., and FCC regulations.

9. THE CRUX OF THE MATTER: The court below erred when it said, the FCC has broad remedial power, and "Forbes' sole remedy ... lies solely within the administrative powers of the FCC."

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."

Marbury v. Madison, 1 Cranch 37, 163,
5 U.S. 137, 2 L.Ed. 60 (1803)

"Everyone shall have a remedy for an injury done to his person or property." Maxim of Common Law

"The cooperation and help of laymen, as well as of lawyers, is necessary if the right of reasonable access to the courts is to be available to the indigent among us. *Reasonable access to the courts is a right {secured by the Constitution and the laws of the United States}, being guaranteed as against state action by the due process clause of the fourteenth amendment.*"

Justice DOUGLAS in *Johnson v. Avery*, 393 U.S. 483, 498

Additional Jurisdiction

In addition to remedies provided by *§§ 1983 and 1985 of Title 42:*

. . . 28 USC § 1331(a) . . . 28 USC 1343

* * *

As more fully shown in petitioner's separate *Brief*, the FCC's "comprehensive enforcement mechanism for protection of a federal right," is a mere chimera, a sham, a mockery that fails to protect asserted rights and serves as a cloak to destroy those same rights under color of law. Plaintiff did everything he could to protect his rights through the FCC. His rights were abrogated, and he suffered great harm because the FCC "comprehensive enforcement mechanism" is a worthless prophylactic, unwholesome snake oil. Like *Means*, plaintiff Forbes sought relief [through ... channels] and was denied an effective timely remedy.

"* * * We express no view of whether exhaustion of tribal remedies is a prerequisite of federal relief ... because we find that the plaintiffs made every reasonable attempt to exhaust their ... remedies. . . We find that plaintiffs have done all they could to exhaust ... remedies in this case, but their right ... has been frustrated by inaction ... 'The plaintiffs sought relief [through ... channels] and were denied an effective timely remedy.' *Brown v. United States,* 486 F.2d 658, 661 (8th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 837 (8th Cir. 1975)

* * *

The FCC would not or could not protect plaintiff's rights. Now that the irreparable harm has been done, the FCC is powerless to restore, in the words of the 8th Circuit Order of December 22, 1992, "relief with respect to it to have any meaning." But, unlike the Court, the FCC is powerless to compensate the plaintiff with remedial, compensatory and exemplary damages. The FCC has no remedy. Contrary to the words of the district court below: Forbes' sole remedy ... lies solely within the courts, not the administrative powers of the FCC.

Proof that Congress intended for persons harmed by failure to protect rights to exercise their rights to seek judicial remedy is the fact that no hint of remedial redress by the FCC can be found. Moreover, if Congress attempted to remove the protection of basic, substantive rights protected by the Constitution beyond the aegis of the judicial shield, it would be unconstitutional. Please see Plaintiff's separate *Brief* and excerpts from *Wong Yang Sung v. McGrath*, 70 S.Ct. 445, 339 U.S. 33, *infra*.

10. The Courts Have Power To Redress The Wrongs In This Case

The Fourteenth Amendment authorizes Congress to reach purely private conduct. "Viewed in its proper perspective, § 5 of the Fourteenth Amendment appears as a positive grant of power, authorizing Congress to exercise its discretion in fashioning remedies to achieve civil and *political* equality for all citizens * * *"

United States v. Guest, 383 U.S. 745, 782-784
86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239
Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)
Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971)
Scott v. Moore, 640 F.2d 708 (1981) at 725

* * *

The district court found it had jurisdiction pursuant to 42 USC §§ 1981, 1982, 1983 and 1985(3), and their accompanying jurisdictional statutes, 28 USC §§ 1343(1), 1343(3) and 1343(4). The Eighth Circuit, *En Banc,* found that the District Court had jurisdiction under 1985(3) and, therefore, did not address the applicability of the other sections.*

Action v. Gannon, 450 F.2d at 1229 (8th Cir. 1971)

*In 1975 the Eighth Circuit said "28 U.S.C. § 1343 is the statute which actually gives the court jurisdiction to redress violations of the substantive statutes named."

Means v. Wilson, 522 F.2d at 837, (8th Cir. 1975) n.2.

The Eighth Circuit, *En Banc,* ruled [1] that 42 USC § 1985(3) gave the court jurisdiction over the conspiracy; and [2] the constitution provided the court with its source of power to encompass the conspiracy under §§ 1 and 5 of the Fourteenth Amendment. *Action v. Gannon*, 450 F.2d at 1231-1233, including footnote 8, (8th Cir. 1971)

Plaintiff incorporates herein, the discussion and reasoning of the court at 1231-1238 in *Action v. Gannon*, upholding the sufficiency and constitutionality of this case.

"* * * It is thus apparent that the right to vote in federal

elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. § 1985(3)."

Means v. Wilson, 522 F.2d 833 at 838 (8th Cir. 1975) citing;
Griffin v. Breckenridge, 403 U.S. 88, 106;
91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)
United States v. Classic, 313 U.S. 299, 314-315,
61 S.Ct. 1031, 85 L.Ed. 1368 (1941)
Ex Parte Yarbrough, 110 U.S. 651, 658-662,
4 S.Ct. 152, 28 L.Ed. 274 (1884)

"Today we hold that 42 USC § 1985(3) protects the right to vote in ... elections against interference from private conspiracies as well.

"Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote ... may be vindicated under 42 U.S.C. § 1985(3) as a deprivation of equal protection of the laws or equal privileges and immunities under the law."

Means v. Wilson, 522 F.2d 833 at 839 (8th Cir. 1975)

11. "IMPLIED" PRIVATE CAUSE OF ACTION IS *NOT* REQUIRED

"* * * *Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights* defined in statutory and constitutional provisions except where Congress has *explicitly* indicated that such remedy is not available."

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956) {Emphasis supplied by Plaintiff.}

There is no explicit language in Title 47, nor Title 42, to preclude the District Court from presiding over trial to protect constitutional rights pleaded.

* * *

12. FREEDOM OF SPEECH & EQUAL RIGHTS

"...[T]he Court has made it abundantly clear that First Amendment rights are protected by § 1 of the Fourteenth Amendment." See n.9.

Action v. Gannon, 450 F.2d at 1234 (8th Cir. 1971)

n.9. See, for instance, *New York Times v. Sullivan,* 376 U.S. 254, 276, 77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686 (1964), and the cases cited therein; *Louisiana ex rel. Gremillion v. N.A.A.C.P.,* 366 U.S. 293, 81 S.Ct. 1333, 6 L.ED.2D 301 (1961); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231, (1960); *Staub v. Baxley,* 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Cantwell v. Connecticut,* 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed 1213 (1940); *Lovell v. Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *DeJonge v. Oregon,* 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937); *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660 (1936).

Paraphrasing the Court: Plaintiff Forbes has a right to express the views of himself and the classes he represents, equally with others, free of censorship, prior restraint, discrimination and other abridgements, infringements and trespasses. "The fact that the ... opinions may be offensive to the (defendants) does not render them outside the protection of the First Amendment." *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed.2d 1 (1971); *Bachellar v. Maryland,* 397 U.S. 564, 90 S.Ct. 1312, 25 L.Ed.2d 570 (1970); *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). As the Supreme Court has said:

"* * * [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute * * * is nevertheless protected against censorship or punishment, unless shown likely to present a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance or unrest. * * *"

Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949).

Action v. Gannon, 450 F.2d at 1232 (8th Cir. 1971)

"[T]he Supreme Court has characterized the right of free association as 'a right which, like free speech, lies at the foundation of a free society.' *Shelton v. Tucker,* 364 U.S. 479, 486, 81 S.Ct. 247, 251, 5 L.Ed.2d 231, 236, (1960). Our legal system honors the freedom of the individual to associate as he chooses because that freedom 'tends to produce the diversity of opinion that oils the machinery of democratic government and insures peaceful, orderly change.' *Gilmore v. City of Mobile,* 417 U.S. 556, 577, 94 S.Ct. 2416, 2427, 41 L.Ed.2d 304, 321, (1974). The importance of freedom of association has led the court to call it one of the 'indispensable liberties,' *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 461, 78 S.Ct. 1163, 1171, 2 L.Ed.2d 1488, 1499 (1958), which ranks 'among our most precious freedoms.' *Williams v. Rhodes,* 393 U.S. 23, 30, 89 S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968). The right of association is fundamental in our constitutional scheme of values."

Scott v. Moore, 640 F.2d 708 (1981) at 722

The invasions against plaintiffs are in violation of express constitutional rights embracing *every* facet of the First Amendment, speech, all basic political rights, association and assembly, petition and the redress of grievances, even the free exercise and establishment of a "politically correct" state religion; both the Equal Protections and Due Process provisions of the Fourteenth Amendment; and in violation, at least of 42 USC §§ 1983 and 1985; and 47 USC §§ 312 and 315.

While, it is true that Congress has not expressly provided remedy for injuries caused by violation of 47 USC §§ 312 and 315, *this court and the Supreme Court have ruled that it is not necessary*. It is clear that every person is entitled to a remedy at law; and that the Courts have a duty to help fashion such remedies.

"The courts are not bound by mere forms, nor are they to be misled by mere pretences. They are at liberty - indeed they are under a solemn duty - to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a

statute (or regulation, or interpretation thereof) purporting to have been enacted to protect the public health, the public morals, or the public safety (or the public's right to know) has no real or substantial relation to *(or defeats)* those objects, *or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.*"

Mugler v. Kansas, 123 U.S. 623, 662 (Italics supplied.)

13. CURING "THE FUNDAMENTAL ADMINISTRATIVE EVIL"

In respect to Defendants' hiding behind the "interpretations" and "procedures" of the FCC, Petitioner respectfully calls this honorable Court's attention to the following principles enunciated by the Supreme Court:

"Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the past half century. ... The conviction developed, particularly within the legal profession, that this power was not sufficiently safeguarded and sometimes was was put to arbitrary and biased use.

"Concern over administrative impartiality and response to growing discontent was reflected in Congress ... Fears and dissatisfaction increased as tribunals grew in number and jurisdiction *** The Executive Branch of the Federal Government also became concerned as to whether the structure and procedure of these bodies was conducive to fairness in the administrative process. (at 448, 36-38)

"More fundamental, however, was the purpose to curtail and change the practice of embodying in one person *or agency* the duties of prosecutor and judge. (The "fundamental" "administrative evil ... to be cured" was the carrying on of) judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influence properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render es-

cape from these subversive influences impossible.

" 'Furthermore, the same men are obliged to serve both as prosecutors and judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings of the commission, in the role of prosecutor, presented to itself.' {at 70 S.Ct. 450, 339 U.S. 41-42}

"*** And the Attorney General's Committee on Administrative Procedure ... was unanimous that this evil existed. Its Final Report said: 'These types of commingling of functions of investigation or advocacy with the function of deciding are thus plainly undesirable ...' {70 S.Ct. at 451, 339 U.S. 44}

"*** The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body." {70 S.Ct. at 454, 339 U.S. 49}

Wong Yang Sung v. McGrath, 70 S.Ct. 445, 339 U.S. 33

This case involved the procedural rights of illegal aliens. How much more should the courts protect the most essential, substantive, inherent, indefeasible rights of the individual Citizen and the Nation, all the People.

As evil as it was, a procedure was established whereby non-citizens could attempt to find justice. But in the instant case, Congress has not provided an administrative or quasi-judicial remedy to afford compensation and restitution for persons whose First and Fourteenth Amendment protected rights have been violated.

Neither the FCC bureaucrats nor the FCC licensed defendants take an oath to uphold the Constitution. Unlike the federal judiciary who are made relatively independent and free from political and other pressures by the immunities of life time tenure and salaries that may not be lowered if they make decisions that would displease powerful interests; the FCC and its agents are twisted and torn by some of the wealthiest and most powerful special interests in the country. The electorate is outraged by the revolving door in which the regulators regu-

late the public in the interests of that which they are supposed to regulate. Plaintiffs' substantive, most fundamental rights are abolished under color of FCC interpretations, and yet Plaintiffs are told they must beseech the FCC for redress. And the FCC, even if it were so inclined, has no power to compensate persons whose rights have been annihilated.

If an agency, or even the legislature, clearly misinterprets or nullifies a constitutional provision, the frequent repetition of the wrong will not make it right. (*Amos v. Mosley*, 77 So. 619)

Under the principles of powers, it is settled that the legislature may not confer judicial functions upon the members of the executive branch of government. Ministerial officers are incompetent to to receive grants of Judicial powers from the legislature, and their acts in attempting to exercise such powers are necessary nullities. *16 AmJur 2d § 328*

Nor, may the people look to Congress to rein in the powerful masters of the media. If the fourth estate has the power to bring down a presidency, reelect or defeat a congressman, how rare will be a courageous representative worthy to be mentioned in the profiles of courage, much less an effective majority?

14. Plaintiff's Case States Sufficient Cause Of Action

The denial of express rights, and the denial of equal enforcement of the laws by defendants was motivated by hostility to plaintiff, his ideas and views, and the classes and their interests that plaintiff seeks to represent and defend.

This is an action provoked by a "class-based, invidiously discriminatory animus behind the conspirators' action." It is a conspiracy that aimed "at a deprivation of the equal enjoyment of rights secured by the law to all. *Griffin v. Breckenridge,* 403 U.S. 88, 102; 91 S.Ct. 1790, 1798; 29 L.Ed.2d 338, 348 (1971)

The court added in footnote 10: "The motivation requirement introduced by the word 'equal' into the portion of § 1985(3) before us must not be confused with the test of 'specif-

ic intent to deprive a person of a federal right made definite by decision or other rule of law' articulated by the opinion in *Screws v. United States,* 325 U.S. 91, 103, 65 S.Ct. 1031, 1036, 89 L.Ed. 1495, for prosecution under 18 USC § 242. Section 1985(3), unlike § 242, contains no specific requirement of 'wilfulness.' *Cf. Monroe v. Pape,* 365 U.S. 167, 187, 181 S.Ct. 473, 484, 5 L.Ed.2d 492. The motivation aspect of § 1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus."

"Our cases have firmly established that (constitutionally protected rights do) not necessarily rest on the Fourteenth Amendment, and (claims are) assertable against private as well as governmental interference. *Shapiro v. Thompson,* 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *id.,* at 642-644, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest,* 383 U.S. 745, 757-760 and n. 17, 86 S.Ct. 1170, 1177-1180, 16 L.Ed.2d 239; *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97; *Slaughter-House Cases,* 16 Wall 36, 79-80, 21 L.Ed. 394; *Crandall v. Nevada,* 6 Wall 35, 44, 48-49, 18 L.Ed. 744; *Passenger Cases (Smith v. Turner),* 7 How. 283, 492, 12 L.Ed. 702 (Taney, C.J., dissenting).

"[T]he Supreme Court decided in 1971 to 'accord the words of the statute their apparent meaning' and held section 1985(3) provided a civil remedy for damages against wholly private infringements of constitutionally protected rights. *Griffin v. Breckenridge,* 403 U.S. 88, 97; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 345 (1971)"

Scott v. Moore, 640 F.2d 708 (5th Cir. 1981) at 715

Griffin established four elements for plaintiff to establish cause of action: [1] conspiracy; [2] purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; [3] one or more of the conspirators must commit some act in furtherance of the conspiracy; whereby [4] another is either (a) injured in his person or property or (b) deprived of having and exercising any right or privilege of a citizen of the United States. *Griffin v. Breckenridge,* 403 U.S. 88, 102-103; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 348 (1971)

The 5th Circuit added a fifth element: (5) that the conspirators' conduct must be unlawful independent of the section 1985(3) violation. *McLellan v. Mississippi Power & Light Co.,* 545 F.2d 919 (5th Cir. 1977)(en banc). This was superseded, *Wilson v. Harris Trust & Sav. Bank,* (CA7 Ill) 777 F.2d 1246, and disagreed with by many cases, see *Traggis v. St. Barbara's Greek Orthodox Church,* (CA2 Conn) 851 F.2d 584.

Instant [*Forbes*] case meets all four elements of the *Griffin* test, plus the superfluous "independent" transgression. Ironically, *because* it meets the fifth test, the independent violation of Title 47 sections by defendants, the lower court penalizes plaintiffs rather than upholding the pleadings.

Title 47 also regulates the rates commercial licensees, such as the KHOG defendants, may charge candidates. All four commercial television stations that unlawfully censored candidate Forbes' political ads have almost 50% of their market areas outside of Arkansas, in Oklahoma, Missouri and Kansas. While it is true residents of sister States could not vote for Forbes, many Arkansans may have had an opportunity to have seen one of Forbes' ads while exercising their right to travel in one of the adjoining States *if* the defendants had not censored the ads. And, the candidacy of plaintiff may have been helped by contributions from viewers in adjoining States. Plaintiff had the right to express his views, based on quotations from Scripture and Thomas Jefferson with all Americans.

Commerce clause empowered Congress to reach private conspiracy. Article I, section 8, clause 3 "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States v. Wrightwood Dairy Co,* 315 U.S. 110, 119, 62 S.Ct. 523, 526, 86 L.Ed. 726, 732 (1942). "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. *United States v. Women's Sportswear Mfg, Ass'n.,* 336 U.S. 460, 464, 69 S.Ct. 714, 716 93 L.Ed. 805, 811 (1949). et seq.

Scott v. Moore, 640 F.2d 708 (1981) at 726

Availability of injunctive remedy under 42 USC § 2000a does not preclude recovery of monetary damages under 42 USC 1985(3). *Fisher v. Shamburg*, (1980, CA10 Kan) 624 F.2d 156

Exhaustion of administrative and state court remedies is not prerequisite for jurisdiction.

Hazard v. Weinberger, (1974 SD NY) 382 F.Supp. 225, affd without op (CA2 NY) 519 F.2d 1397

Even anti-injunction provisions of Norris-LaGuardia Act did not deprive court of jurisdiction to enjoin deprivations under 42 USC 1985(3).

Non-union workers were a protected class with First Amendment right to freely associate protectable by court.

"The Ku Klux Klan Act was originally entitled, 'An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for Other Purposes.' 17 Stat. 13 (1871). The guaranties afforded by the First Amendment are protected by the due process clause of the Fourteenth Amendment. *E.g. Williams v. Rhodes,* 393 U.S. 23, 30-31, 98[sic] S.Ct. 5, 10, 21 L.Ed.2d 24, 31 (1968); *New York Times v. Sullivan,* 376 U.S. 254, 276-77, 84 S.Ct. 710, 724, 11 L.Ed.2d 686, 704 (1964); *Cantwell v. Connecticut,* 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed 1213, 1217 (1940); *DeJonge v. Oregon,* 299 U.S. 353, 364, 57 S.Ct. 255, 260, 81 L.Ed. 278, 283 (1937). Moreover, the right of free association is closely aligned with the right of free speech and is similarly protected by the First Amendment. *E.g., Abood v. Detroit Board of Education,* 431 U.S. 209, 233, 97 S.Ct. 1782, 1798-99, 52 L.Ed.2d 266, 279 (1972); *Baird v. State Bar of Arizona,* 401 U.S. 1, 6, 91 S.Ct. 702, 705, 27 L.Ed.2d 639, 646 (1971); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 462, 78 S.Ct. 1163, 1171-72, 2 L.Ed.2d 1488, 1499 (1958)"

Scott v. Moore, 640 F.2d 708 (1981) at 716

"Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme Court's approach to other Reconstruction civil rights statutes in recent years 'to "accord

[them] a sweep as broad as [their] language." ' " *Griffin v. Breckenridge,* 403 U.S. 88 at 97; 91 S.Ct. 1790 at 1796; 29 L.Ed.2d 338 at 345 (1971) ...

"[S]ection 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. *See, e.g., Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (prisoners); *Johnson v. American Credit Co.,* 581 F.2d 526 (5th Cir. 1978) (debtors attacking state pre-judgment attachment procedure); *Morris v. Michigan State Bd. of Education,* 472 F.2d 1207 (6th Cir. 1973) (sex). Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes."

Scott v. Moore, 640 F.2d 708 (1981) at 719

Petitioner respectfully points out that *Means* {and *Hare Krishna* case cited in appellant's separate *Brief*} also clearly show that court below was in error to dismiss because plaintiffs did not allege racial bias.

"However, the congressional debates evince a hearty regard for persons who are victimized because of their *political* beliefs and associations. {Emphasis on "*political*" supplied by appellant.} Today's Ku Klux Klan proclaims itself to be a racist organization. But in 1871 it was regarded primarily as a *political* one ... Senator John Sherman of Ohio voiced this concern after he read aloud from a copy of the Klan's secret oath, 'showing that here is a *political* organization, with *political* ends, *political* aims ...' Cong. Globe, 42d Cong., 1st Sess. 153 (1871). The Klan's *political* objective formed a recurrent theme in the Senate debates."

Scott v. Moore, 640 F.2d 708 (1981) at 721

"{All of the plaintiffs and defendants were American Indians and members of the same tribe, the Oglala Sioux.} In interpreting this class-based discrimination test the Fifth Circuit has said:

'There need not necessarily be an organizational structure of adherents, but there must exist an identifiable body with which the particular plaintiff associated himself by some affirmative act. It need not be an oath of fealty; it need not be

an initiation rite; but at least it must have an intellectual nexus which has somehow been communicated to, among and by members of the group.'

Westberry v. Gilman Paper Co., 507 F.2d 206,215 (5th Cir. 1975) ... in our opinion, the reasoning above quoted was and is valid in the light of *Griffin.* The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff (by petitions, votes, etc.) ... were a class against whom ... the defendants discriminated against because of their class membership. This brings their complaint within the ambit of 42 U.S.C. § 1985(3). *Cameron v. Brock,* 473 F.2d 606, 610 (6th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 840 (8th Cir. 1975) citing;

"However, courts have also granted protection to classes {in addition to women, Jews, and religious bodies} whose members are discriminated against because of their *political* beliefs or their associations. *See, e.g., Means v. Wilson,* 522 F.2d 833 (8th Cir. 1975), *cert. denied,* 424 U.S. 958, 96 S.Ct. 1436, 47 L.Ed.2d 364 (1976) (supporters of a particular political candidate); *Gleason v. City of Louisville,* 518 F.2d 899 (6th Cir.), *cert. denied,* 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975) (political demonstrators); *Smith v. Cherry,* 489 F.2d 1098 (7th Cir. 1973), *cert. denied,* 417 U.S. 910, 94 S.Ct. 2607, 41 L.Ed.2d 214 (1974) (voters for a sham political candidate); *Cameron v. Brock,* 473 F.2d 608 (6th Cir. 1973)(supporters of incumbent sheriff); *Action v. Gannon,* 450 F.2d 1227 (8th Cir. 1971)(worshippers at a predominantly white Catholic church disrupted by black civil rights protestors).

Scott v. Moore, 640 F.2d 708 (1981) at 723

CONCLUSION & REMEDY

Therefore, from all of the foregoing and the points and authorities in separate *Brief* re *DeYoung,* Plaintiff has presented a case, that if proven, is a cause of action. The order of the district court dismissing the pleadings with prejudice should be reversed. Plaintiff should be granted sufficient time and opportunity to amend the complaint and to proceed with discovery.

It is a fact, not a conclusion, that AETN defendants denied plaintiff equal enforcement of the laws in violation of

the Constitution and law, under color of law, and abridged and trespassed against First Amendment secured rights.

It is a fact, not a conclusion, that KHOG defendants censored plaintiffs ads in violation of the Constitution and law, under color of law, and discriminated against him and the classes he represents.

It is a fact, not a conclusion, that other unnamed defendants to control the outcome of a run-off, selectively closed 90% of the polling places in the 72 counties petitioner had carried in the preferential primary in 1990, in violation of the Constitution and law, under color of law, and discriminated against him and the classes he represents.

It is a fact, not a conclusion, that all defendants acted out of "class-based, invidiously discriminatory animus" against plaintiff, his positions and expressions, and the classes and ideas, he represents.

Wherefore, Plaintiff/appellant respectfully moves this honorable Court to reverse and void the December 16, 1992, order of the district court dismissing complaint with prejudice, and such appropriate orders and remedies that will effectually preserve plaintiff's rights.

Respectfully,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person,

Box 88
London, AR 72847
501/293-4641

AFFIDAVIT OF VERIFICATION OF FACT

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 16 Day of Feb, 1993.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

CERTIFICATE OF SERVICE

I, s/ Karen Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 16th Day of Feb, 1993, by U.S. mails.

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APPENDIX W

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

NO. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS, et al.,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, et al.,
APPELLEES.

PLAINTIFF'S COMBINED REBUTTAL TO BRIEFS OF AETN & KHOG DEFENDANTS

**"INJUSTICE *ANYWHERE*
IS A THREAT TO JUSTICE *EVERYWHERE.*"
Dr. Martin Luther King, Jr.**

* * *

A. Standard of Review

* * *

These pleadings should be regarded *de novo* as a whole and liberally construed by this honorable court.

Plaintiff submits that an amended complaint will show a long and continuing train of abuses and usurpations, pursuing invariably the same object, that evinces a design, a systemic pattern of deprivation of rights against plaintiff, and those classes he represents, by defendants, who are united in their purpose to deny Forbes and those he represents their substantive and equal rights, including a wholesale systematic closing of voting places that were required by law to be open.

Furthermore, *new evidence* has come to plaintiff's attention that contradicts what KHOG News Director Len Pitcock told Forbes on October 15th, 1992 (Page 7, ¶11., Motion for Emergency TRO); and plaintiff alleges that the exclusion of Forbes from the KHOG sponsored debate was not an innocent oversight but a view point biased discrimination in violation of Amendments I, V, IVX of the U.S. Constitution; §1983 and §1985 of 42 USC; §315 of 47 USC; and numerous provisions of the Constitution and laws of the State of Arkansas.

B. THERE IS A RIGHT OF ACTION FOR VIOLATION OF RIGHTS, TO SECURE EQUAL PROTECTIONS OF THE LAW, FOR DUE PROCESS OF LAW AND A COMMON LAW RIGHT TO TRIAL BY JURY ...

THIS COURT HAS CONSTITUTIONALLY MANDATED JURISDICTION

... *Article III, Section II* ... *Article VI*, Constitution of the United States; ... *28 USC §1331* and 28 USC § *1343*.

This court's Order of December 22, 1992, expressly declared: "The underlying case is not moot. The complaint contains a prayer for money damages."

Can the FCC award plaintiffs monetary damages?

* * *

In suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved ... according to the rules of the common law.*

The Constitution of the United States, Amendment VII

This court's Order of December 22, 1992, denied plaintiff's request for rehearing en banc because "*it is no longer possible for the grant or denial of preliminary injunctive relief with respect to it to have any meaning.*" If this court itself can provide no remedy for the wrongs other than compensation, *how can a regulatory commission* that has jurisdiction *only* over the defendants' license to use certain radio frequencies for commercial purposes, *with no powers of redress, provide any meaningful relief?*

THE PEOPLES' RIGHTS & BELIEFS ARE *PRICELESS PROPERTIES*

"No person shall be ... deprived of life, liberty, or *property without due process of law.*"
The VIth Amendment to the Constitution of the United States of America

A law or procedure is *not* "due process" when it's in "conflict with the fundamental principles of liberty and justice which lie at the base of all civil and political institutions."
Bute v. Illinois, 333 U.S. 640, 92 L.Ed 986, 68 S.Ct. 763

James Madison, The Principle Framer & Father of *The Constitution, Bill of Rights*, and *Federalist Papers*, declared:
"**[A] man has a *property* in his opinions *and the free communication of them*** ... In a word, as a man is said to have a right to his property, *he may be equally said to have a property in his Rights.* Where an excess of power prevails, property of no sort is duly respected. *No man is safe in his opinions*, his person, his faculties, or his possessions... *Government is instituted to protect property of every sort* ... This being *the end* of government ... *Conscience is the most sacred of all property*; other property depending in part on positive law, *the exercise of that being a natural and inalienable right* ... Madison, *Property*, 1792

Plaintiff's liberties of conscience and beliefs *and the free communication of them* are his most priceless possessions and personal property enjoying special protections of the laws. The defendants have wilfully, wickedly and maliciously, under color of regulation, deprived plaintiff and the people, the classes he represents of this "most sacred of all property."

Moreover, *if* the defendants had not conspired to deny the people their right to cast an informed ballot there is a good chance that Plaintiff Forbes would have won a plurality in a "free and equal," open election, which the people were denied.

* * *

All persons who contributed time or funds to plaintiff Forbes' campaign had a reasonable right to expect that defendants would obey the laws so that [1] the viewpoints and expres-

sion they shared with Forbes would be fairly communicated without prior restraint, censorship or repression; and [2] that Forbes could campaign for these suppressed viewpoints on a playing field in which the minimal rights protected by law would be honored, not blatantly ravished; and [3] that their rights of political expression would enjoy equal protections that are afforded to persons who hold other viewpoints.

* * *

§315 is only one of *the many* Constitutional provisions *"and laws,"* violated by defendants, that secure "rights, privileges or immunities" of which plaintiffs have been deprived "under color of ... regulation" by the defendants, making them liable to the plaintiffs *"in at action at law ... for redress,"* pursuant to *42 USC §1983.*

C-1. PLAINTIFFS' GOD-GIVEN RIGHTS ARE ENFORCEABLE BY THE COURTS OF LAW.

In addition to the points and authorities cited in plaintiff's **Appeal from "Order to Dismiss"** showing that *this Court has jurisdiction ...47 USC 402 (a)* and *28 USC 158 ... "Explicitly* Provide For Judicial Review of The FCC." *to assure that the Commission remains faithful to that "clear statutory purpose."*

See *Maer v. FCC*, 735 F.2d 220 (1984) ft. note 4;
L. Jaffe, *Judicial Control of Administrative Action 569-575* (1965)

This court has power to set aside as unlawful any action that is unconstitutional, or "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Administrative Procedure Act, 5 USCA 553, 706(2)(a)

C-2. THE DEFENDANTS ARE WITHOUT EXCUSE: *EVEN THE FCC CONDEMNS THEM*

On page 5 of their brief defendants refer to an FCC document of "a few days before Mr. Forbes filed his amended complaint." {No copy supplied by defendants.} "A few days before," on October 30, 1992, the FCC wrote a letter to Mr. Becker (DA 92-1503) in reference to a conflict over his desire to show a video showing an actual abortion procedure. The conflict in

that instance arose out of the fact that the Becker video *shows female genitalia,* and may come under the FCC's indecency definition of sexual organs under certain conditions.

This particular (*Becker*) video and controversy *have absolutely nothing whatsoever to do with* the (*Bailey*) footage used by Forbes which shows *no* sexual organs *and had been previously approved, over and over again by the FCC.*

Defendants either don't understand the factual issues, or they have misled the court re the *Becker* case which they purport "permits" the defendants' censorship, *because this October 30th letter specifically prohibited the defendants to censor or "channel" Forbes' ad.*

See footnote 1 of DA 92-1503 {*Plaintiffs Exhibit #20*} which says in pertinent parts:

"... **The Bureau concluded that the advertisement was *not indecent* and that *licensees therefore could NOT "channel" the ad to the indecency safe harbor without running afoul of sections 312(a) (7) and 315 of the Communications Act...*** {Emphasis supplied.}

* * *

Defendants claim justification for deprivation of plaintiffs' rights under color of FCC regulation; but defendants' actions are are all in breach of and *contrary to the very FCC rules* which they pervert into illicit monstrosities. These deviant dictates are the exact opposite of the clear and plain meaning of the letter and spirit of the laws they subvert and displace. This is totally subversive of congressional intent and constitutionality. The defendants shamelessly attempt to use these convoluted nullities as a fig leaf to try to hide their transgressions from the eyes of justice.

C-3. THE FCC IS INCOMPETENT *DE JURE & DE FACTO* TO REDRESS INJURIES

The defendants are attempting to mislead the controversy away from the basic fact that *plaintiffs have suffered great irreparable injury as a direct result of their violation of express, fundamental rights under color of law by the defendants.* This court must not be snared into straining at a gnat

while swallowing camels cooked up by the specious and insidious distortion of the case by the defendants.

The mere claim by defendants that "there is no private right of action" for violation of *47 USC §315, prima facie* demonstrates, establishes and proves that:

THE FCC SCHEME *Is Not An Adequate Remedy At Law;*

And therefore, forcing an injured party to surrender basic rights to a *non-judicial,* extra-constitutional commission that has no lawful jurisdiction, *no powers to redress nor compensate,* no true due process, no motivation or inclination, nor history or record of providing justice and indemnification, *is not a lawful substitute for the right to the day in court, to which an injured party is entitled to by right.*

Petitioner Forbes does not waive, surrender or forsake his priceless birthright, nor the common law birthrights of we, the people, for any mess of pottage, particularly the fraudulent FCC scheme.

D. PLAINTIFF EXHAUSTED ADMINISTRATIVE REMEDIES

Petitioner asseverates that on November 2, 1992, he wrote and mailed a letter* to Mr. Milton Gross at the FCC complaining about the defendants' violation of 47 USC §315 and the FCC's own findings. *To this date, your petitioner has heard not one word from the FCC in response to this serious allegation. ...*

All Laws Which Are Repugnant To The Constitution *Are Null And Void.* {Chief Justice MARSHALL}
Marbury v. Madison, 1 Cranch 137, 174, 176 (1803)

Two centuries before the landmark *Marbury* decision, Lord Coke in Dr. Bonham's case (1610) declared: "[T]hat when Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

The language of the Constitution cannot be interpreted safely, except where reference to Common Law (as it was in understood in Britain is made)... when the instrument was framed and adopted. The statesmen and lawyers of the convention who

submitted it to the ratification of the thirteen states, were born and brought up in the atmosphere of the Common Law and thought and spoke in its vocabulary ... when they came to put their conclusions into the form of fundamental law in a compact draft, they expressed them in terms of Common Law, confident that they could be shortly and easily understood.

Ex Parte Grossman, 267 U.S. 87, 108

All laws should receive a sensible construction. General terms should not be so limited in their application as to lead to injustice, oppression or an absurd consequence.

United States v. Kirby, 7 Wall 482

It is demonstrably not true that there exists anything remotely resembling an "effective, comprehensive administrative scheme" to protect a candidate's rights to equal access and the public's rights to be informed. *IF it existed this case would never have come to court.* Plaintiff's rights and the people's rights would not have been violated. Plaintiff did **not** want to be forced to appeal to the courts, at great personal costs in time, energy and money against the legal powers of the state and powerful, legal firms that specialize in protecting powerful interests who act as if they are above the law, for enforcement of his most fundamental rights. *Plaintiff did everything reasonable and lawful within his power to secure his rights.* There may be more than the usual animosity and prejudice against plaintiff, but the FCC "scheme" fails to protect everyone's rights "equally" in what can only be described as "equal opportunity tyranny." ...

Where Rights secured by the Constitution are involved there can be no rule making or legislation that would abrogate them. *Miranda v. Arizona*, 384 U.S. 436 at 491

"For a government official to mouth in a ritualistic way" {*U.S. v. Tarlowski*, 305 F.Supp. 112} certain Rights, while in effect reversing the meaning of the words used, he gravely transgresses. The FCC scheme purports to protect a candidate's rights to equal access and opportunity while in effect it forecloses any possibility of securing these rights. It is sham to give the appearance of "due process," that inexorably deprives the candidate and the people their rights all under color of "due process."

However, even IF it were true that plaintiff has not yet "exhausted" his pre-judicial remedies; to force him to first proceed to "exhaust his administrative remedies" would be a mere exercise in futility. Even *if* the FCC were to rule in his favor at this late date, *the FCC is even more powerless than this court to grant any "meaningful relief;"* **Therefore**, if waiting for a "final" refusal by the FCC were a requisite for plaintiff to seek redress in the courts of the land, *this action should not be dismissed "with prejudice"* in order to allow plaintiff to go through the administrative motions and then pursue his cause through the courts of law.

* * *

EQUAL TIME AND THE PUBLIC INTEREST

"From the very beginning of broadcasting in this country Congress has been aware of the potential of the new media to influence public opinion, particularly in the political forum. To say that time has confirmed that judgement is to understate the obvious. To protect political candidates, local and national, from the danger of partisan use of the media, as well as to protect the constitutional principle of electoral equality, congress inserted the equal time provision in its first major piece of legislation relating to broadcasting and it has remained the law to this day."

Chisholm v. FCC, 538 F.2d 349 (1976) 367, from minority opinion by the Honorable J. Skelly WRIGHT.

The case of *Office of Com. of United Ch. of Christ v. FCC*, 707 F.2d 1413 (1983) which included the following parties: Office of Communication of the United Church of Christ, FCC, CBS, National Association of Broadcasters, Radio Station Licensees, ABC, NRBA, MBS, Black Citizens for Fair Media, ACT, NOW, NAACP, Episcopal Church, Catholic Church, etc. yields the following points:

1. Courts accord only limited deference to an agency's interpretation of its own governing statute; *to do otherwise would risk diluting the judiciary's power to stand guard against bureaucratic excesses by ensuring that administrative agencies remain within bounds of their delegated authority.* (West Key 219[1])

2. It is the quintessential function of the reviewing court to ... strike down those agency actions that transverse the limits of statutory authority. (West Key 763)

3. ... courts remain the final authorities on issues of statutory construction and are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with statutory mandate or that frustrate the congressional policy underlying a statute.

4. ...*abrupt shifts in policy constitute "danger signals" that the Commission may be acting inconsistently with its statutory mandate*... (West Key 14)

The Commission Has Ruled "Studio Debates" Between Candidates And "Debate-Type" Format Is *Precluded* From Classification As A *Bona Fide* News Event And Therefore *Do Not Exempt Licensee From Affording Equal Time* Under 47 USC 315. *35 ALR Fed 82* at 866

It is well defined that we require an agency to follow its own prior rulings and regulations. *Service v. Dulles*, (1954) 354 U.S. 363, 372, 77 S.Ct. 499, 98 L.Ed 681

The FCC was doing its job as authorized by Congress, until it bowed to the power of the licensees it was created to regulate and reversed its long standing enforcement of equal time, fairness, etc. And it is under color of these perversions that the defendants have deprived plaintiffs of their rights.

The common theme throughout the line of cases descending from *Red Lion* is the judicial intent to carefully craft a balance between all of the conflicting interests. This delicate balance was predicated upon [1] the assurance that the FCC would protect the paramount right of the people to be informed by enforcing *§312* and *§315* of the Act to prevent censorship, suppression, unlawful discrimination; and [2] the Fairness Doctrine which may be likened to a guy line which prevents a station's antenna tower from toppling to disaster. The FCC unilaterally slashed both of these tether lines that anchored the courts' "carefully crafted, delicate balancing act" and sent it crashing to destruc-

tion. Thus, the FCC has *de facto* overturned every restriction against full, equal and fair access to the FCC regulated media. ...

The inescapable conclusion is that the FCC lied to the courts and exceeded the bounds of statutory authority by reversing its own long standing positions and promulgating regulations that contravene congressional intent and collides with the Constitution of the United States, Articles I, II and III of the Constitution, which delegates and reserves the separate legislative, executive and judicial powers to the three respective branches of government and transgresses against the First, Fifth and Fourteenth Amendments.

"Those Then, Who Controvert This Principle, That The Constitution Is To Be Considered In Court As A Paramount Law, Are Reduced To The Necessity Of Maintaining That Courts Must Close Their Eyes On The Constitution And See Only The Law.

"THIS DOCTRINE WOULD SUBVERT THE VERY FOUNDATION OF ALL WRITTEN CONSTITUTIONS."

Marbury v. Madison, 5 U.S. 137 at 176, 1 Cranch 37, 163, 2 L.Ed. 60 (1803)

Wherefore, Plaintiff/appellant respectfully moves this honorable Court to reverse and void the December 16, 1992, order of the district court dismissing complaint with prejudice, and such appropriate orders and remedies that will effectually preserve plaintiff's rights.

Respectfully,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person,

Box 88
London, AR 72847
501/293-4641

CERTIFICATE OF SERVICE

I, Ralph P. Forbes, verify that I have served true and correct copies of the foregoing to the Defendants and/or their counsel at the following addresses believed by me to be their place of business, this 1st Day of April, 1993, by U.S. mails.

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Supreme Court, U.S.
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SEP 19 1994

In The

Supreme Court of the United States

October Term, 1994

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

APPENDICES - III

Ralph P. Forbes,
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85 pp

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APPENDIX X

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, ET AL.,
APPELLEES.

BRIEF IN ANSWER TO AND IN OPPOSITION TO "PBS' " "AMICI" BRIEF

> **"Yes, we did produce a near perfect Republic. *But will they keep it,* or will they, in the enjoyment of plenty, *lose the memory of freedom?*"**
> **Thomas Jefferson**

***

STATEMENT OF THE CASE

This is NOT a case where a claim is made for a right to "appear on television."

This is a case to preserve the inalienable, inherent rights protected by the First Amendment for the Plaintiff, the People of Arkansas, and the People of the United States and our Posterity.

This Cause seeks to restore and preserve the fundamental prerequisites of a constitutional Republic of Law, of government of, by and for the people. All of the cardinal, underlying foundations of a self governing, free people are at stake here, with particular focus is upon Article III, the First, Fifth and Fourteenth Amendments to the Constitution of the United States.

PRELIMINARY STATEMENT

If allowed to stand the decision of the District Court will effectually repeal the First and Fourteenth Amendments and establish the aristocracy of the Fourth Estate as an extra-unconstitutional branch of government, an all-powerful, super-"legal" Orwellian Ministry of Truth by "legalizing" the powers of state officials and powerful special interests to control and censor practically all the information to which the American People will have access.

Ultimately, this will lead to an Orwellian totalitarian tyranny and destroy the Nation and the Constitution which this honorable Court is bound to protect and preserve.

A decision abrogating the basic rights claimed by Plaintiff would have a profound impact on the nation's right to self government by a free and informed electorate.

The (defendants) ... and ... *government entities* must be enjoined from usurping absolute power as a veritable *Ministry of Truth* "to include or exclude spokespersons or viewpoints." This Court must make it clear that the Law, the First Amendment, the Fifth Amendment, the Fourteenth Amendment and 47 USC § 312 and 315 *as written and intended by Congress,* et seq., apply, so they have no "right" to censor viewpoints and expression, but conversely *They Do Have A Constitutional And Statutory Duty To Afford Equal Opportunities To Candidates And Viewpoints, Even Those They Oppose.*

If the defendants would obey the law and cease violating the most essential rights secured by the Constitution and laws, there would be no need for "legal challenge and judicial intervention," such as this.

Enforcing the Constitution is *not* "judicial intrusion."

But, giving the defendants *carte blanch* to censor opinions and viewpoints and to unlawfully discriminate against persons and classes in the name of "editorial decisions" would be repugnant to the First Amendment.

"Legalizing" censorship by calling it "discretion" or any other name is also inconsistent with reason and the statutory scheme of the Communications Act which requires the licensee to provide programming "which will be responsive to the interests of people both in particular localities and throughout the United States, and which will constitute an expression of diversity and excellence, and which will constitute a source of alternative [programming] . . . ." 47 U.S.C. § 396(a)(5).

Censorship. The denial of the right of "freedom of the press" and the right of "freedom of speech," *and all of those rights which are had under a free government.*

Esquire, Inc. v. Walker, D.C.D.C., 55 F.Supp. 1015, 1020

In section of Federal Communications Act providing that licensee shall have no power of censorship over material broadcast by legally qualified candidates for public office, the word "censorship" connotes *any* examination of thought or expression in order to to prevent publication of objectionable material.

Farmers Ed. and Coop. Union of America, N.D. Division v. WDAY, Inc., N.D., 79 S.Ct. 1302,1304, 360 U.S. 525, 3 L.Ed.2d 1407

"Censorship consists of present governmental interference with or suppression of expression and is a regulatory, proscriptive or compulsory exercise of governmental power.

Keene v. Meese, D.C.Cal., F.Supp. 1111,1118

The "amici" claim that ... defendants are merely "editing" under regulatory powers is preposterous. Editing is selection and choice of material, and may or may not include, or be misused as a pretext for censorship. *But Exclusion Of Candidates And Viewpoints Is Censorship.* It is not "editing." And to hypocritically pretend bald, *prima facie* censorship is "editing" or "content regulation," *ad absurdus,* is brazen casuistry.

The purport that debates set up, sponsored, controlled and censored by broadcast stations is "news," [to contrive] a loop hole big enough to drive a nation of sheep through, is not only preposterous on its face, but is an unethical deceit that fails on grounds of inconsistency. *The Code of Ethics or Can-*

nons of Professional Journalism and *The Television Code of the National Association of Broadcasters* condemn manufactured or contrived "news" in which the news organization initiates or sponsors the "news" as unethical *non-news.*

Thus, for a broadcaster to set up and sponsor a debate and call it a *bona fide* "news event" is patently a fraud and a hoax by the standards defining news adhered to by the "amici" and the defendants.

* * *

... The censorship, exclusion, denial of rights, and unequal protections of the law were blatantly "an effort to suppress expression merely because (defendants) oppose the (petitioner's) views."

"... *The Right Of The People ... To Petition The Government For A Redress Of Grievances,*" May Not Be Abridged.

It is axiomatic that Citizens and Natural Persons are entitled to have a Remedy at Law. *The Judicial Power is reposited in the Courts,* not the FCC. Nor may such powers and duties be constitutionally transferred, nor nullified. The Bill of Rights and the Law of the Land guarantees Citizens and Natural Persons access to the Courts and Common Law Rights.

The government may NOT abridge the Right to Petition our Government for redress of grievances. An action at law is certainly one form of Petition; but a forced march down the proverbial garden path with *Alice Through the Looking Glass* into the never-never wonder land of Washington bureaucracy where "The Rule Is, Jam Tomorrow, And Jam Yesterday - ***But Never Jam Today!***" is no adequate remedy under law, nor a satisfactory substitute for the right to one's day in court where the Constitution is recognized as the supreme written Law of the Land and where equal justice for all without regard to person, class, wealth, power or creed is respected.

It is repugnant to the Constitution for any congressional, judicial and/or bureaucratic scheme to infringe upon constitutionally guaranteed rights, and/or to put these rights at the mercy of some bureaucracy. Licensed broadcasters, privileged

and powerful entities, such as the defendants and their "amici" cohorts are under the jurisdiction of the Federal Communications Commission *to curtail them from abusing the powers granted them by the people, such as they have done in the instant case.* It is irrational to claim that the rights of the people, and of the plaintiff, must be surrendered to a regulatory agency *so that the regulated licensee can violate the Constitution and laws with brazen impunity.* The Supreme and Constitutional Courts have exclusive jurisdiction to enforce the Constitution and defend rights.

* * *

Failure to reverse the District Court's decision would deeply entrench the powers of censorship that are lethal to our constitutional form of popular government. A judicial mandate that gives any broadcaster ... the power to dictate the parameters of speech and information and to usurp the powers and rights inalienably retained by the people would be subversive and odious to the First Amendment and the Liberty of the People.

To "legally" enmesh the (defendants' "good faith") "editorial decisions" as a surrogate for the people's free and independent thought is offensive and abhorrent to the Constitution. Judging issues and candidates is the innate prerogative of the People and it may not be usurped by the "amici"s' self-styled "Ministry of Truth."

The First Amendment does not countenance, much less require, such "editorial" interference in the unabridgeable rights of free expression.

* * *

The "amici" state: "In exercising their editorial discretion (defendants) will unavoidably make programming decisions which can be characterized as 'politically motivated.' " *Then on the face of it, "editorial discretion" is violative of the Constitution,* and this court must enjoin defendants and "amici" from using (the rubric of "good faith") "editorial discretion" as a facade for *politically motivated censorship.*

The best and only constitutional way to free "virtually every programming decision subject to judicial challenge" is to make it clear that only the broadest, least restrictive criteria meet the constitutional and statutory requirements that are "responsive to the needs, problems and interests of the residents of the area they serve. . . ."

A general license "legalizing" licensee's censorship as "political programming decisions" would clearly be contrary to the Constitution and would render the First Amendment obsolete and nugatory.

(Defendant's) euphemistic ("good faith" censorship) ... constitutes precisely the sort of (editorial censorship) ... decision" that is forbidden by the First, Fifth and Fourteenth Amendments and 42 USC 1983, 1985, 47 USC 312, 315, et seq.

It is no different than a decision, for example, to declare that "war is peace," "black is white," "We have always been at war with Oceania, and we have always ...!"

Or, "**CENSORSHIP IS *FREE SPEECH!***"

(The pretext of "good faith determination"). . . is unadulterated NewSpeak for the ugly words, *censorship, discrimination, suppression and thought control.* A broadcaster's claim to a "right" to (censor) view points goes to the very heart of the abominable attack against the First Amendment.

* * *

. . . When the defendants and "amici" usurp the roles of censors and politically correct thought police it is the duty of the court to enforce the clear constitutional mandate.

* * *

. . . Appellant respectfully points out that the (defendant's) intent to defend the indefensible demonstrates the truth that the ... censorship of appellant's speech and denial of equal protections of the laws by the defendants was not a mere one time aberration by misguided individuals, but is in fact a pervasive pattern, the general design of a self-anointed class of "politically correct" commissars to usurp an unconstitutional monopoly with the power to control what the people, the electorate, shall be permitted and/or denied the right to hear.

The pretext of "editorial decisions" claimed by the ... Defendants and their erstwhile "Amici" allies is a brazen Orwellian euphemism for censorship. Inherent in this power of censorship is the power to unlawfully discriminate, to hide animus and hostility under the sham and cloak of "editorial responsibility." The purpose of the Defendants and their "Amici" accessories is to unconscionably enmesh the courts into "legalizing" their de facto conspiracy to deprive the appellant, the People of Arkansas, and ultimately all the People of the United States of all of their rights by unconstitutionally controlling and censoring all meaningful expression under color of the facade of "legality," hiding behind the pretense of "editorial decisions."

* * *

"... The More Imperative Is Our Need To Preserve Inviolate The Constitutional Rights Of Free Speech, Free Press And Free Assembly *In Order To Maintain The Opportunity For Free Political Discussion, To The End That Government May Be Responsive To The Will Of The People* And That Changes If Desired, May Be Obtained By Peaceful Means. Therein Lies The Security Of The Republic, The Very Foundation Of Constitutional Government."

Justice Charles Evans HUGHES,
DeJonge v. Oregon, 299 U.S. 353, 365 (1937)

When this Nation was founded it was mocked by the entire world. At best, it was called a "noble experiment," doomed to failure. Yet, none of the "eternal" empires and absolute, mighty monarchies of those days have survived, while our constitutional republic has endured two centuries of trials and is the inspiration for all who dream of Liberty and Justice. Our People, our history, the courage and wisdom of the great minds that have presided over judicial system have proven: A government such as ours can never fail so long as the people believe in the security of Absolute Law, Natural Law of Rights and Duties guarded by those who have dedicated themselves to upholding righteousness and justice.

But, a government of law, such as our heritage, can never survive as rule by men, caprice, whim and arbitrary

decisions on the winds of the "political correctness" *de jour,* or as the lackey and tool of the privileged and the powerful. Our nation stands so long as the great fundamental, essential principles are preserved in granite;

But we will fall if ever we succumb to tolerating constitutional vandals, like *Animal Farm* pigs, to desecrate and transmute our Law with "amici" spray paint and obscene Orwellian graffiti:

THE SIX COMMANDMENTS OF NEW ORWELLAND

1. "All are equal, *but some are more equal than others.*"

2. Free speech means *the power to censor.*"

3. Censorship is "legal" as long as those who are "more equal" than others mask it under politically correct Orwellian NewSpeak such as "journalistic decisions essential to discharging their obligations as licensees under the Communications Act."

4. Commercial corporations and powerful special interests shall also have power under the first amendment to decide what the people shall or shall not be allowed to hear.

5. But, Natural Persons and ordinary Citizens shall not be allowed to interfere with the First Amendment powers of the State and/or the privileged state licensees.

* * *

Our Nation was founded upon the bedrock of the Bill of Rights, *not the vagaries of Orwellian slogans and deceptions.* We long prospered under the proposition that we had a legal, moral and political standard *based on absolute immutable Law that transcended man.*

President Jefferson, the author of our Declaration of Independence admonished us *to escape tyranny, men must be bound by the chains of The Constitution.*

Jefferson and so many great and wise have also forewarned us:

THE PRICE OF LIBERTY IS ETERNAL VIGILANCE.

Even "fourscore and seven years" after "our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal." Honoring the fallen at Gettysburg, President Lincoln articulated the fateful question that is germane today: "whether that nation or any nation so conceived and so dedicated can long endure." Our country survived that terrible tragedy and was reborn as a Nation. Since that time many more have sacrificed the last full measure of devotion to preserve our liberties. Today, in this Court room, in this case, we are met on a great battlefield, a contest for the heart, soul and future of America, that may well decide the answer to this question. Let us, who follow after righteousness, hearken to the words of Isaiah, the prophet, and look unto the constitutional bedrock from which our nation is hewn, and to the spiritual springs from which we are sprung {Isa. Ch. 51}, so "that this nation, under God, shall have a new birth of freedom; and that government of the people, by the people and for the people shall not perish from this earth."*

If The Foundations Be Destroyed, *What Can The Righteous Do?* Psalm 11:3

The Judicial Power is delegated to the Court by the People and is expressly, explicitly and implicitly by consent of the governed by virtue of the constitutional covenant. This compact binds all governmental officers and public servants including the FCC and the judiciary. This Constitution is the supreme Law of the Land. All judicial Officers are bound by

---

* * *

* "We have staked the whole future of American civilization, not upon the power of government, far from it. We have staked the future of all our political institutions ... upon the capacity of each and all of us to to govern ourselves, to control ourselves, to sustain ourselves, *according to the Ten Commandments of God.*" James Madison

"We have no government armed with power capable of contending with human passions unbridled by morality and religion. Avarice, ambition, revenge or galliantry would break the strongest cords of our Constitution as a whale goes through a net. *Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.*" John Adams, **Works of John Adams, 2nd President of the United States**, collected by Charles Francis Adams, 1854.

Oath or Affirmation to support this Constitution. If ever this supreme contract is broken then the court system, itself, would be without lawful or moral authority; and the nation would stand on voracious quicksand.

Court precedents do not and should not supplant the Constitution. What the Constitution *says,* and not what commentators say about it, is decisive. To err is human, and even the greatest of justices and courts err. That is understandable; but it is intolerable when errors are given quasi-infallible status, so that every subsequent decision based upon them becomes compounded error, creating a legalistic Frankenstein monster that devours the true letter and spirit of the Constitution. The courts were designed to be the people's shield, in Hamilton's words, "the bulwarks of a limited constitution against (tyrannical) encroachments." But, the original "sin" of infringing upon the First Amendment in favor of the powerful media, where two wrongs make a right, and each successive wrong only makes it "righter," has made abridgment routine.

"Legal" is not necessarily synonymous with Lawful. ***Power is almost always in conflict with authority.*** There is no question those who been licensed to broadcast over the public's airwaves have been granted vast powers, and they have demonstrated they have the power to suppress (and or publish any thing they choose), the Constitution and the Law not withstanding; *but they do not have the right nor the Lawful authority to act as "Big Brother" and control thought and expression in what is supposed to be a free and open society.*

A bureaucracy, or any branch of government, legislative, executive or judicial, may, out of fear of the media, and/or in unholy league to usurp absolute political power, "legalize" the defendants' and "amici"s' claimed "rights" to censor, suppress, control and "legitimize" speech, thought, beliefs, views, expressions and opinions, *but all of the "legalizations" from here to* Marbury v. Madison *will never make such censorship and unlawful discrimination lawful, constitutional or right!*

An airplane in flight, or a ship at sea, is almost always off course; but it arrives at its destination by virtue of constant correction. When it veers left, it compensates by moving right.

But if the captain or navigator was stubbornly guided by an error, and compounded that miscalculation with error upon error, soon all bearings would be lost, and disaster inevitably result; unless there is a fundamental correction of these errors.

If one of the members designed to stabilize the craft in flight were lost, immediate corrective action must happen to save the craft and all on board. If a shift is made in the direction of the imbalance the aircraft is in danger of falling into an inextricable tail spin. *The FCC shot away the Fairness Doctrine regulator, and free speech in the controlled airwaves is plummeting to destruction.* This Court must recognize this fundamental shift in the "carefully crafted" regulatory scheme, and restore control to the First Amendment.

Distortion upon contortion of the concept of free speech and equal rights has led the nation and law so far astray that the siren songs of totalitarian tyranny sound like motifs of freedom. This Court, in this case, has the opportunity and the sacred duty to correct the constitutional course and save the nation from catastrophe on the shoals of slavery and tyranny.

"Amici" and defendants can't stand the plain and clear commands of the Constitution, so they have no prospect to prevail except by the conundrum of obfuscation, complexity and confusion.

"Too much light often blinds gentlemen of this sort. **They cannot see the forest *for the trees.*"**
Musarion [1768], *canto II,* Christopher Martin Wieland

In *New York Trust Co. v. Eisner,* 256 U.S. 345, 349, 41 S.Ct. 506,507, 65 L.Ed 963 (1921), Justice HOLMES tersely observed that "a page of history is worth a volume of logic."

From this it follows that a brief overview of history will help bring all of the many claims and voluminous citations before the Court into proper perspective and focus.

"Yes, we did produce a near perfect Republic. But will they keep it, or will they, in the enjoyment of plenty, lose the memory of freedom?" Thomas Jefferson

The Decline and Fall of The Great Republic: *Is It Inevitable?*

Let us look at the history of a mighty nation, the Great Republic. The pilgrims that started the nation were searching for religious freedom and personal liberty. When the pilgrims arrived at their new land, it was occupied by uncivilized tribes. After a long and hazardous journey they found refuge near a large rock and thanked their God for their safe journey and pledged their devotion. They later enshrined the rock that they stepped upon, and this rock became a world-renowned monument, and after many years is yet one of their new country's great landmarks. The pilgrims, who were rigidly stern, had a great faith in their god and after they made a settlement in the new land, they proclaimed a Thanksgiving Day.

Religious schools were then established, which became the world's first free public education. The colony grew and expanded, but the rest of the world looked at this effort as a joke.

As time went on, great prosperity came to this new land. Punishment was severe for law breakers and those who would not work could not eat. More colonists came to this new land and established more settlements, and the noble words such as "liberty," "equality" and "freedom of religion" rang throughout the land. Soon the old world, from whence the pilgrims came, began to levy high taxes on the colonists and they retaliated by gathering an army and choosing a gentleman farmer to be its general. A famous American city is named after this same general. After winning complete independence, a new government was formed, which was made up of two houses, the most powerful one being called the Senate. The new nation was a republic, *but did not stay a republic for long.* A great civil war broke out and the leader who tried to keep the nation united was assassinated in the capital city. It was not long until power-hungry senators began to represent private business interests instead of the people. The republic began to get involved in foreign affairs which led to wars. The wars brought ever increasing taxes, but because the wars also created jobs, people tolerated the almost imperceptible decline. Taxes were introduced to "tax the rich," but soon the middle class began to bear the tax burden. Farmers began to rise up and demand that the government subsidize them and

give them price supports. The government bought surplus crops and put them in storage until they rotted. Soon many businesses began to ask for special tax benefits and subsidies. The central government became so powerful that people began to worship it as deity with a spirit of patriotism. Soon massive mounts of people began to live off the government on welfare and began to bask in the free services. This created such a heavy tax burden on the middle class that it soon was swallowed up and joined the ranks of the welfare recipients. Next came a great war which the nation was led into by a crippled man. A famous general who fought in this war was criticized by his own government, and when he called this nation to return to original honor and values, he was mocked and scoffed at. Then one senator rose up and spoke out against foreign aid which was draining the people's money, but the public called him a radical and rejected him. *Soon liberty and freedom of speech were reduced to cynical mockeries, and the unchallenged lies of scoundrels decided the destiny of the once-upon-a-time Republic.* The nation went into the depths of debt. Crime became so common that the streets were unsafe. Taxes still increased all the more, and wheat was sent to enemies. The currency was devalued, and precious metals for coins were substituted with base metals. The nation then sent experts and advisors to train other nations in the latest techniques of war. By this time the nation was totally corrupt, the economy was destroyed, the middle class disappeared and civilization was lost for centuries of dark ages.

The name of the nation described by all of the above is *Ancient Rome!* The pilgrim rock was the foundation stone of the Temple of Jupiter. The farmer and general was Cincinnatus; Cincinnati, Ohio is named after him. Julius Caesar was the assassinated leader that tried to hold the nation together. The crippled leader was Caligula. Mark Antony was the general who called for the return to original values, and Cicero was the senator who opposed foreign aid.

"There is nothing new under the sun." Ecclesiastes. 1:9

Adapted from *Honoria* by Taylor Caldwell
cf., Once There Was A Great Nation, by Gary M. Rekstad,
New York, NY; "*The Modern Romans: The Decline of Western Civilization*" [1971 ed.]; *et seq.*

IS OUR REPUBLIC DOOMED TO SUFFER THE SAME FATE, *OR CAN WE LEARN FROM HISTORY?*

The pernicious symptoms attributed to aging are not foregone. It is possible to gain wisdom and maturity while rejuvenating and reinvigorating the body politic, just as it is for the individual who is willing to embrace the challenges and opportunities of life. The remedy to restore our Republic to the vigour and joy of its youth may be found in the wisdom of its founders:

"Equal and exact justice to all men, of whatever state or persuasion, religious or political ... Freedom of religion; freedom of the press, and freedom of person under the protection of the *habeas corpus,* and trial by juries impartially selected. These principles form the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation. The wisdom of our sages and the blood of our heroes have been devoted to their attainment. They should be the creed of our political faith, the text of civil instruction, the touchstone by which we try the services of those we trust; and should we wander from them in moments of error or alarm, *let us hasten to retrace our steps and to regain the road which alone leads to peace, liberty and safety.*"

Thomas Jefferson, *First Inaugural Address,* March 4, 1801

"The forms of your democratic government might for a time have remained, but its living spirit would have departed from it... But you must remember my fellow citizens, that *eternal vigilance by the people is the price of liberty, and that you must pay the price if you wish to secure the blessing.*"

President Andrew Jackson's Final Message, March 4, 1837
Compilation of The Messages and Papers of the Presidents, by James D. Richardson, a Representative from the State of Tennessee, published by the authority of Congress, 1900. Vol. 4, Page 1523.

Wherefore, for all of the above, and for the further reasons enumerated in Appellant's separate Briefs in support thereof, the "Amici" claims should not be considered by this honorable Court;

But if considered properly, the "Amici" presentments actually prove the Plaintiffs case.

Plaintiff prays the Court's indulgence for any mistakes in the foregoing in that it had to be prepared in the final hours of the week end of August 28th and 29th while preparing for the trip to St. Louis. Plaintiff also apologizes for the length, but he points out researching and typing is more effort than reading; and that it was the "amici" brief that compelled this rebuttal.

Moreover, there were other candidates whose rights and views were transgressed in what appears to have been an interstate conspiracy to suppress their common views by broadcasters. There are many Christian, Pro-Life and conservative organizations and churches who have at least as much as stake as the "amici" parties in protecting their rights and views from oppression and discrimination. They have had no opportunity to be heard. And, it would not be fair to them if their only defender was a common, ordinary Citizen of Arkansas against powerful, entrenched special interests represented by formidable law firms that are specialists in communication regulations, etc.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person
Box 88
London, AR 72847
501/293-4641

CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I received a copy of the Court's Order granting leave to the "Amici" applicants on Friday, August 27th, 1993, and that I will deliver copies to the following Defendants, interested persons and/or their attorneys whom I believe will be present for the Hearing set for August 31st in the above styled matter; if they or their representatives are not present I shall mail copies to them at the following addresses:

Mr. Tom Gay
Attorney General's Office Senior Assistant
323 Center St., 200 Tower Bldg.
Little Rock, AR 72201-2610

Mr. Robert L. Jones, III
Jones, Gilbreath, Jackson & Moll For KHBS-TV
401 N. 7th St., Box 2023
Ft. Smith, AR 72902-2023

James P. Mercurio
Arent Fox et al
1050 Connecticut Ave., NW
Washington, DC 20036
(202)857-6016

Mr. Michael E. Gans
8th Circuit Court of Appeals Clerk of Court
114 Market St. #511
St. Louis, MO 63101 1-314/425-5609

s/Ralph P. Forbes

RALPH P. FORBES

APPENDIX Y

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, ET AL.,
APPELLEES.

PLAINTIFF'S RESPONSE AND OPPOSITION TO "BRIEF AMICUS CURIAE FOR FEDERAL COMMUNICATIONS COMMISSION"

Proclaim Liberty Throughout All The Land
Unto All The Inhabitants Thereof.
Leviticus 25:10

* * *

STATEMENT OF ISSUES PRESENTED

1. Whether, the American People still enjoy a Constitution that governs the government *rather than a state that rules the people?*

2. Whether laws must be made, applied and enforced pursuant to the Constitution, or whether the Constitution may be twisted and tortured to comply with vagariesand whims of unelected state agents and privileged state licensees?

3. Whether the Constitution is supreme, and laws made pursuant to the Constitution by elected representatives of the people are superior to bureaucratic regulations and convolut-

ed interpretations of such rules by unelected public servants; or the converse is true?

4. Whether the Judicial power, delegated by the people in Articles III and VI to the Courts of Law to decide constitutional cases yet resides in the Courts; or whether the FCC has usurped jurisdiction from the courts and the people?

5. Whether *any* venue, including a publicly broadcast debate, staged, organized and financed by the state, between qualified candidates; [or] a private commercial enterprise, engaged in interstate commerce and licensed and regulated by the state must first be designated a "public forum" before due process and equality before the law apply?

The *Proper* Interest of
The Federal Communications Commission

The Federal Communications Commission is the agency *charged with regulating the broadcast industry* under the Communications Act of 1934, 47 U.S.C. 151, et seq. The FCC has no lawful authority over the people, nor any power or jurisdiction to abridge or infringe against the inalienable and equal rights of Plaintiff Forbes in particular.

The FCC is *mandated* to enforce 47 USC 312 and 315 by compelling *licensed* broadcasters to obey the law and enforce the law equally.

The FCC's *primary* purpose and duty is to protect the paramount rights of the people. The FCC should do this within "the statutory scheme enacted by Congress in the Communications Act to ensure uniformity in regulation of broadcasting." The FCC has, itself, threatened and sabotaged that scheme at least since *Chisholm* by reversing its own rules; *de facto* overturning the statutes it is charged with enforcing and even repealing the Bill of Rights and the 14th Amendment by unreasonable and capricious "interpretations," unequal enforcements; and destroying the "carefully crafted" scheme by revoking the Fairness Doctrine after vowing to the Supreme Court that this important element was almost "sacred."

Whenever, as in this case, the FCC claims jurisdiction and authority over the paramount rights of the people and the indefeasible constitutionally protected rights of citizens, then that claim raises issues clearly within the jurisdiction and authority of the Courts; when the FCC ignores the most serious complaints to it by the plaintiff against licensees, but has the time and resources to expend the taxpayer's monies to *de facto* defend the licensed defendants it is charged with regulating, the FCC demonstrates each and every charge of abuse and usurpation in Plaintiff's **Supplementary Digest**.

* * *

Plaintiff's attempts for even partial redress were exhausted with the KHOG Defendants, also, before plaintiff was forced by defendants to lodge this Action as the only adequate remedy at law.

On Monday, November 2nd, the last day before the elections as the amended Complaint was being served on the KHBS TV affiliates Plaintiff Forbes offered that he was more interested in protecting his and the people's rights than in fighting court battles, and that if KHBS would run his censored ads and give grant him an equal opportunity to present his views to the voters, even though it was probably too late to make any difference, he would drop his complaint against these defendants. This last minute offer for partial redress and reconciliation was met with the sneering reply that "all's fair in love and war," implying and admitting that defendants were at war with Plaintiff, his views and his constituency and that they were free to do anything they wanted to injure him, his views and his rights including censoring his ads, unlawfully excluding him from licensee staged debates and suppressing or misrepresenting plaintiff and his views in any way they chose.

The KHOG/KHBS, ABC Defendants unlawful censoring of Plaintiff's ads was based, not on the knowingly false pretext of "indecency," *but on hostility and animosity against plaintiff and his views; and because the defendants deemed the ads to be too effective, and unanswerable because they were true.*

The District Court wrongfully dismissed the complaint for each and all of the reasons before this Court. That court erred

in presupposing, among other things, that plaintiff was claiming "a First Amendment right to participate in a televised debate;" when in fact, plaintiff was seeking, among other rights, basic, plain and clear equal enforcement of the laws.

The due process clause of the Fifth Amendment guarantees to each citizen the equal protection of the laws and prohibits the denial thereof by *any* Federal official.

Bolling v. Sharpe, 327 U.S. 497

... so as to practically make unjust and illegal discrimination between persons in similar circumstances material to their rights, the denial of equal justice is still within the prohibition of the Constitution. *Yick Wo v. Hopkins*, 118 U.S. 356

* * *

REBUTTAL TO FCC'S "ARGUMENT"

I. THE FCC's CLAIM THAT "DISTRICT COURT LACKED JURISDICTION OF FORBES' COMMUNICATIONS ACT CLAIMS" IS HOLLOW

This Court has the right, the power and the duty to adjudicate the subject matter in this case. All three essentials (cognizance, parties, issue) are here in this case.

Reynolds v. Stockton, 140 U.S. 254, 268

This Court clearly has cognizance of this class of cases.

United States v. Guest, 383 U.S. 745, 782-784, 86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239

Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956)

Brown v. United States, 486 F.2d 658, 661 (8th Cir. 1973).

DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990)

Gutensohn v. Kansas City Southern Ry.Co., 140 F.2d 950, 933 (8th Cir. 1944)

Means v. Wilson, 522 F.2d 833 (8th Cir. 1975)

The proper parties are present. The points to be decided are well within the substance and effect of the issues.

Mugler v. Kansas, 123 U.S. 623, 661
Boyd v. United States, 116 U.S. 616 (1886)
Administrative Procedure Act, 5 USC 553, 706(2)(a)

In particular, the courts should not "'defer' to the judgment of the ... Commission on a constitutional question, or ... hesitate to invoke the Constitution ..."
Columbia Broadcasting Sys., Inc. v. Democratic Nat. Com., 93 S.Ct. 2087; 412 U.S. at 103
Bell v. Hood, 327 U.S. 678 at 684, 66 S.Ct. 773 at 777, 90 L.Ed. 939 (1946)
Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2002,2004, 403 U.S. 388 (1971)
Action v. Gannon, 450 F.2d at 1238 (8th Cir. 1971)
See also, *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36, 53 S.Ct. 454, 457, 77 L.Ed. 1011 (1933) (CARDOZO, J.); *The Western Maid*, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299 (1922) (HOLMES, J.)

The FCC claims the district court lacked jurisdiction because, "[l]itigants may not evade these provisions by requesting the District Court to enjoin action that is the outcome of the agency's order." *Yet, there was no "final order," nor any "order" from the FCC to "evade."*

After the FCC tried to discourage Plaintiff Forbes from claiming his rights for equal opportunity from AETN, Forbes asked the agency to issue a "final order" forthwith, instead of waiting until after the election to deny his demand for enforcement of *47 USC 315* and *47 USC 396* (f)(3), et seq. Only after both FCC and AETN failed to respond to plaintiff's demands for protection of rights did he file a complaint at law in the U.S. District Court at the last possible moment.

By their circumlocution the FCC seeks to bypass both the Constitution and the Courts in order to protect its usurped "turf" and its privileged clients that is charged with regulating.

After going around the bushes with cases more properly under commercial, admiralty, maritime or international jurisdiction in a footnote at 3 the FCC admits:

"None of these specific actions is at issue in this case."

The extent that plaintiff Forbes' claims are based on, or came within, the Communications Act is solely for the FCC enforcement of *47 USC 312 and 315*, et seq., *as applied to licensees*. When both the FCC and the licensees arrogantly, and with hostility, refused to obey the Constitution and the laws of the land, the District Court clearly has jurisdiction to enforce the Constitution and the laws of the land. And the citizen or natural person has a right to his day in court and to enjoy equal protections of the law without regard to person, power, wealth or creed.

* * *

[42 USC 1985(3)] was passed to enforce Amendment 14 to the U.S. Constitution and to protect from interference the rights secured thereby, as well as other constitutional rights; it is directed against conspiracies of private persons; and there is no requirement that conspiracy be under color of law.

Mullarkey v. Borgium, DC NY, 1970, 323 F.Supp. 1218

THE FCC AND ITS AGENTS ARE "PERSONS" WITHIN THE PURVIEW OF CIVIL RIGHTS ACT

* * *

Liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct. Indeed, this was precisely the proposition upon which *42 USC § 1983* was enacted. *Imbler v. Pachtman*, [96 S.Ct. 984, 412 U.S. 409, 47 L.Ed.2d 128 (1976)]

Government immunity violates the common law maxim that everyone shall have a remedy done to his person or property. Immunity fosters neglect and breeds irresponsibility while liability promotes care and caution, which caution and care is owed by the government to its people.

Plaintiff and the people of Arkansas were grievously and irreparably injured by defendants claiming to act under color of FCC sanction, *regulation*, custom or usage.

Moreover, there is strong evidence that the FCC, or some person or persons in authority, actively conspired with the Defendants in this case to unlawfully harm the campaigns

and suppress the expression of views of not only the Plaintiff but all Pro-Life candidates in the 1992 elections.

e.g., Plaintiffs First Amended *Complaint,* ¶¶ 25 ~ 31; 35; @ 5 & 6; and Plaintiff's Attachment, marked as #18, an article from the *Arkansas Democrat-Gazette,* November 1, 1992, p.4-A.

The FCC has at all times in this matter acted in a hostile manner to the paramount rights of the people and plaintiff in particular. The FCC "amicus" brief is *de facto,* if not *de jure,* the weight and power of the federal government joining the defendants' resistance to plaintiff's appeal for justice. At all times the defendants have attempted to use FCC "interpretations" and mock "due process procedures" to provide them "color of law" to deprive the people and the plaintiff of their most precious and fundamental absolute rights.

If even judges are not immune from criminal sanctions under the Civil Rights Act {*ex parte Virginia,* (1879) 100 U.S. 339; *Pierson v. Ray,* (1967) 386 U.S. 547; *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.,* 91 S.Ct. 1999, 403 U.S. 388 (1971); *Duke v. State of Texas,* DC Tex, 1971, 327 F.Supp. 1218; *Yates v. Hoffman Estates,* (1962, DC Ill) 209 F.Supp. 757; *Bramlett v. Peterson,* (1969, DC Fla) 307 F.Supp. 1049; *Westberry v. Fisher,* (DC Me, 1971) 309 F.Supp. 95};

And that Congress intended to do away with whatever common law immunities existed {*Congressional Globe,* 42nd Cong., 1st Session, 365~8; 385 (1871)]; and if FCC regulations are "law" and the FCC is a "law enforcement agency," then *28 USC 2680(h)* allowing individuals to sue the federal government for injuries or damages caused by unauthorized acts or omissions may be applicable as well as *42 USC 1983*:

"So in deciding what congress meant when it referred to 'every person' in *42 USC 1983,* it is significant that congress had earlier rejected specifically judicial immunity by passing the Civil Rights Act of 1986"

Littleton v. Berbler, 468 F.2d 389 (1972)}

And, since this section provides civil action for deprivation of rights or invasion of constitutionally protected rights by "persons acting under state *or federal* authority."

Weise v. Reisner, (DC Wis, 1970) 318 F.Supp. 580

Therefore, from all of the above it appears the Court should *sua sponte* move to change the status of the FCC from that of "amicus" to defendant in this matter.

On page 4 of its Brief the FCC claims that even when there is no FCC order to appeal from *the Circuit Court has original, exclusive jurisdiction.* If that is true, we are here before this Court. It would be futile, and in error if the FCC's assertion is correct, to remand to district court. *This Court has the authority and the duty to fashion a remedy based on Law and Justice.*

Mugler v. Kansas, 123 U.S. 623
United States v. Guest, 383 U.S. 745, 782-784, 86 S.Ct. 1170, 1191-1192, 16 L.Ed.2d 239
Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971)
Richardson v. Miller, 446 F.2d 1247 (3d Cir. 1971)
Scott v. Moore, 640 F.2d 708 (1981) at 725

* * *

The FCC admits it "routinely deals with disputes between candidates and broadcasters concerning such matters." If the law was enforced constitutionally as clearly written and intended, there would be no "routine disputes."

Neither Plaintiff, nor anyone is required to do what is unreasonable and futile. The "procedural" red tape, mere useless, fruitless exercises in futility, with a *guaranteed denial* of rights *after* the election was over is not an "administrative remedy" as the fact finders found in *Muir*. Plaintiff vigorously claimed and asserted his rights with the defendants and the FCC at all times and that is sufficient.

Sporehase v. Nebraska, 458 U.S. 941, 944 n.2, 102 S.Ct. 23456 (1982)
Election Bd. v. SWParty, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979)
Nyquist v. Manclet, 432 U.S. 1, 97 S.Ct. 2120 (1977)
Jackson v. Ogilvie, 325 F.Supp. 864 (ND Ill) aff'd 403 U.S. 925 (1971)
Stevenson v. State Board of Elections, 638 F.Supp. 547, 794 F.2d 1196, USDC for ND of Ill ED, (1986)
Anderson v. Hooper, 498 F.Supp. 898 (DNM 1980)

The FCC approved the footage that Plaintiff Forbes used in his ads, but rather than regulating the offending licensee that censored the FCC-approved ads, the FCC is expending taxpayers' (money) to aid the defendant licensees who violated the Constitution, the laws and the FCC's own rulings.

* * *

"If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the People, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence may justify. The propriety of law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which indeed, cannot easily be imagined), the federal (communications agency conspired with licensees to suppress free thought and speech) would it not be evident that in making such an attempt it had exceeded its jurisdiction and infringed upon (the very vital essence of a free government by consent of the governed)?

"Suppose, again, that upon a pretense ... it should undertake to abrogate (Freedom of Speech and Equal Rights) would it not be equally evident that this was an invasion of (the very existence of America as a constitutional Republic?)"

Paraphrased from *The Federalist Paper, No. 33*

* * *

"Candidacy for public office is one of the ultimate forms of political expression in our society and is therefore protected by the First Amendment."

Edwards v. Reynaud, 463 F.Supp. 1235

The FCC's claims are unconstitutional because they put "*substantially unequal burdens on both the Right to Vote and the Right to associate.*"

Williams v. Rhodes, 393 U.S. 23 at 31; 89 S.Ct. 5 at 10, 21 L.Ed.2d 24 (1968)

FCC actions have irreparably injured Plaintiff Forbes and his most basic Rights violated by the FCC's unconstitutional burdens on "the right of individuals to associate for the

advancement of political beliefs; and the right of qualified voters, regardless of their political persuasion, to cast votes effectively." *Election Bd. v. SWParty*, 440 U.S. 173,184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230, 241 (1979)

Federal courts have jurisdiction when the effect of an act deprives plaintiffs of equal protections of the laws by debasement of their votes.

Anderson v. Celebrezze, 460 U.S. 780 (1983)
Baker v. Carr, 369 U.S. 186, 7 L.Ed.2d 663, 83 S.Ct. 691
McLain v. Meier, 637 F.2d 1159 (1980) 8th Circuit
MacBride v. Exon, 558 F.2d 443 (8th Circuit, 1977)

* * *

PLAINTIFF'S RESPONSE - II -

RE: FCC's Brief For Appellant The Federal Communications Commission In *Gillett* Communications of Atlanta, Inc, V. Daniel Becker, Et Al., No. 92-9080 In The United States Court of Appeals For The Eleventh Circuit On Appeal From The United States District Court For The Northern District Of Georgia

STATEMENT OF THE CASE

The *Gillett v. Becker* case is in some respects relevant, *but in other's it is a convoluted mirror image that improperly understood or applied could result in tortured conclusions diametrically opposite to facts, reason and justice.*

1. [a] The plaintiff, *Gillett* aka "WAGA-TV5," in that case is an FCC licensed entity;

But [b] the plaintiff in this case is a natural person, citizen and a qualified at the time congressional candidate with innate, inalienable rights not subject to FCC regulation.

2. [a] The ads in that case were challenged for indecency because they included depictions of "female genitalia, the uterus, excreted uterine fluid ..."

[b] The Forbes' ads did *not* include any of these, but rather footage *explicitly approved by the FCC* for use in such ads. Ironically, this footage used by Forbes was again approved by the FCC in the Becker case.*

---

* In August 1992, prior to bringing this suit, Gillett and a private law firm filed "petitions for declaratory ruling" with the FCC, seeking a determination that a broadcaster may, consistent with the Act, channel to early morning hours anti-abortion political advertisements featuring graphic depictions of dead fetuses. The petition specifically cited an earlier anti-abortion political advertisement submitted by Becker and which WAGA-TV5 had aired on July 19, 1992 at 7:58 p.m. See exh. A-l to Becker's Oct. 29, 1992 Memo. In Opp. (R1-4).

In an order issued August 21, 1992, the FCC Staff denied Gillett's and the law firm's petition. See Exh. A-l to Becker's Oct. 29, 1992 Memo. In Opp. (R1-4), reported in Letter to Vincent A. Pepper, 7 FCC Rcd 5599 (MM Bur. 1992). The Staff ruled that "[t]o the extent these petitions seek a general ruling by the Commission that a class of program material -- that is, any depiction of dead fetuses or fetal tissue -- is indecent, we decline to so rule." (Id. at p.2). The FCC Staff further ruled that "[a]s a general matter, broadcasters may not direct candidates to unwanted times of the day or evening." (Id. at 3). *The FCC Staff then went on to examine the earlier tape submitted by Becker and aired by WAGA-TV5 and concluded that this specific advertisement* (which included the footage already approved by the FCC and used by Forbes) *was "not indecent."* (id. at 4).

"It is this *second* (genitalia) tape (*not* the FCC-approved Forbes' tape) that is at issue in this case." FCC Brief before the 11th Circuit at 8

3. [a] Gillett (WAGA-TV) sued the FCC asking the district court to enjoin the FCC from taking any regulatory action against WAGA-TV either for channelling the Becker videotape to the hours of 12:00 midnight and 6:00 a.m., or in the alternative, for broadcasting [the Becker tape] at the time requested by Becker and his Campaign.

[b] Forbes did not sue the FCC.

Quoting the FCC Brief at 4: In an order entered October 30, 1992, the district court ruled that it had jurisdiction over the complaint. (Slip op. at 6) (R1-6-7). The court acknowledged that the Hobbs Act, 28 U.S.C. 2342(1), accorded the courts of appeals exclusive jurisdiction over FCC orders. The court, however, noted that because the FCC had not issued an order in this case (none having been sought by WAGA), the issue was not one of jurisdiction but of whether the court should defer to the "primary jurisdiction" of the FCC. Concluding that the nearness of the election and the legal nature of the

questions presented militated against such deference, the court declined to require Gillett (an FCC regulated licensee) to exhaust its administrative remedies before the FCC.

Under the communications Act of 1934, 47 U.S.C. 151 et seq., Congress has expressly authorized the FCC *to regulate the telecommunications industry* (not the people). It has vested the FCC with authority to conduct administrative proceedings necessary to resolve matters arising under this mandate. Under 47 U.S.C. 151, the FCC is charged with the duty to "execute and enforce the provisions of this chapter [47 U.S.C. Ch. 5]." Under 47 U.S.C. 154(j), the FCC is required to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business *and to the ends of justice.*" Section 312 of 47 U.S.C. at issue in the Becker litigation empowers the FCC to "revoke any station license or construction permit" and provides for such revocation "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified Federal candidate for Federal elective office on behalf of his candidacy." (47 U.S.C. 312(a)(7).[2] Prior to such a revocation, the FCC must serve upon the licensee a show cause order and permit the licensee to appear before the Commission. (47 U.S.C. 312(c)).

Section 315(a), 47 U.S.C. 315(a), also involved in this litigation, provides that if the licensee should permit any legally qualified candidate for any political office to use the broadcasting station, then the licensee "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station."[3] Section 315(a) further provides that the licensee "shall have no power of censorship over the material broadcast

[2] 47 U.S.C. 312(a) provides:

The Commission may revoke any station license or construction permit - (7) for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy.

[3] 47 U.S.C. 315(a) provides:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station.. Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section.

under the provisions of this section." Section 315(c) instructs the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

* * *

I. THIS COURT HAS JURISDICTION OVER THE FCC'S APPEAL

The Plaintiff is sufficiently aggrieved by the actions of the Defendants and the district court's order to have Article III standing to pursue this appeal.

In its appeal in *Gillett* the FCC claims that even when it wins in a court of law: "Such an order adversely affects the FCC in that it effectively deprives the Commission of its right to address these issues ..."

The FCC has no "right." The FCC claims in *Gillett* and its intrusion in this case parade the FCC's insatiable lust for usurpations and "turf."

This Court in the Hearing of October 21, 1992, took judicial notice that the natural rights of the people are paramount and supreme and that the rights of plaintiff as a natural person and citizen are inalienable in response to plaintiff's **Demand for Declaratory Judgment**. The FCC is a creature of the Congress. The Congress is a creature of the People, which has been delegated certain powers, but limited by the Constitution {Article I} and Law of the Land. The Bill of Rights enjoins Congress from abridging Rights of Free Speech, denying Due Process, Equality before the Law, etc. The FCC has no lawful authority to do what Congress may not do, nor pretend to "permit" licensed entities to violate rights, the Constitution and the laws. The FCC has duties to the people and certain powers to regulate licensed entities; *but the FCC has no rights!*

The FCC's claims in this case would effectively eliminate the ability of the Court to exercise its jurisdiction in these kinds of cases -- a fatal harm to the Constitution and to the paramount public interest. These harms to the people and the plaintiff are sufficient to accord it Article III standing to have remedy at law.

The FCC admits at 14: "Becker, of course, has incontestable standing to appeal the district court's judgment." So does Forbes.

II. The FCC States: "The District Court Lacked Jurisdiction Over The Subject Matter of Plaintiff's Complaint"

IF this be so (that jurisdiction properly lies in the circuit court), *then the district court in this case lacked jurisdiction to dismiss it,* and should have directed this case to this honorable (8th Circuit) Court.

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive Jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.

In any event the FCC admits that this Court is superior to it and its "orders."

This is an action at Law invoking Common and Natural Law and important constitutional issues, not admiralty, nor maritime, nor commercial, etc. jurisdictions.

Ultimately, the Courts have jurisdiction over administrative actions.
Shaughnessy v. Pedreiro, 349 U.S. 48; 75 S.Ct. 591; 99 L.Ed 868;
Wong Yang Sun v. McGrath, 339 U.S. 908; 70 S.Ct. 564

The only administrative record in this case is *inaction,* foot dragging, non-responsiveness and hostility by the FCC to the plaintiff's claims. Nevertheless, the FCC points out that the Supreme Court held that "[o]ne purpose of the Hobbs Act was to avoid the duplication of effort involved in creation of a separate record before the agency and before the district court."
(*Florida Power & Light Co. v. Lorion*, 470 U.S. at 740 (1985))

There is a record before this Court. To send it somewhere else would create "the duplication of effort" that should be avoided.

The People through the Constitution vested Judicial power and primary jurisdiction to the Courts of Law. The FCC's claims to usurp that power are unconstitutional. Whether Congress "authorized" the FCC to abrogate the Con-

stitution is simply not relevant, because Congress has no authority to abridge irrepealable Law.

The question is whether the Court (yet) has jurisdiction to decide constitutional questions, *or whether the FCC and its pretended powers and orders have supplanted the Constitution as the supreme Law of the Land.*

Indeed, acceptance of the FCC's "reasoning" would mean that the jurisdiction of the courts would turn on the "expert opinion" of this unelected bureau.

Denying Citizens their right to justice in the Courts, forcing them to jump through the FCC's hoops with its attendant delays would mean that 47 USC 312 and 315 and the First and Fourteenth Amendments, et seq., would never be enforced; and the FCC and its favored licensees would control the minds of the people.

More fundamentally, the FCC is empowered to enforce the "reasonable access" provisions of section 312(a)(7). But when the FCC fails in this particular case, and as a pattern, to perform its clearly mandated duty to provide "an affirmative, promptly enforceable right of reasonable access" by ordering the licensees to obey the law, then the Courts of Law become the only proper forum for redress and remedy.

III. WHETHER "GILLETT FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES" OR NOT IS IRRELEVANT; *BECAUSE THE FCC's & THE DEFENDANTS' DEMANDS AGAINST FORBES ARE UNREASONABLE*

A. *Gillett*, as a regulated fictitious entity, is subject to lawful FCC authority;

B. But the people, the plaintiff, natural persons and citizens and their rights, are not.

The Constitution and Unbridgeable Rights are not to be short-circuited by spurious claims that "The Exhaustion Doctrine Is Jurisdictional And Requires Exhaustion of Administrative Remedies Before the FCC."

Nevertheless, Plaintiff Forbes applied to the FCC to enforce the law. The FCC said it would not. They claimed their own interpretations of their own regulations superseded the Constitution and laws. The FCC demanded that plaintiff be compelled to submit to a "procedure" that could not possibly be "exhausted" until after the election was over and which would result in an inevitable denial of the rights asserted by the FCC. Only after the recourse of appeal to the FCC and the Defendants to obey the law was exhausted, time had all but run out, and further reliance on the FCC was rigorously futile did Plaintiff commence this Action.

Two centuries before the landmark *Marbury* decision, Lord Coke in Dr. Bonham's case (1610) declared: "[T]hat when Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void."

(*cf., Fed.Rules Civ.Proc. Rule 81 (a)(2), 28 USCA.; Capital Traction Co. v. Hof*, 174 U.S. 1, 43 L.Ed 873, 19 S.Ct. 580)

* * *

An excellent discussion re immunity from futile, irrational and unreasonable requirements is found in Mr. Justice BREWER's Opinion in *Church of the Holy Trinity v. U.S.*, 12 Sup. Ct. Rprtr. 511 (1892).

"... ((S)ince) men are furnished with powers of reason, it is obviously the design of the Creator that reason should be employed as their guide in every stage of life ..."

Noah Webster: *Letters to a Young Gentlemen Commencing His Education*

Plaintiff Forbes believes *his rights and the rights of the people come from God.* They are not "granted" by government, *but secured by the Constitution.* To surrender these rights, to reduce them to mere privileges that may be permitted or denied by men, by caprice or whim, is selling one's God-given heritage for a mess of pottage, and therefore a sin; and a betrayal of predecessors, who sacrificed so much for our rights and liberties. No one should be compelled to do that which is unreasonable, irrational, harmful and dangerous, especially when such acts violate one's religious beliefs, prin-

ciples, and conscientious scruples.

The Jurisdiction of the Courts of Law over cases of constitutional controversy, common law, monetary value in controversy, etc. *is mandated by the Constitution.*

Plaintiff Forbes gave the FCC more than a 'fair opportunity' to pass on a legal or factual argument" by asking the FCC to speed up the foregone denial so that he could escape irreparable injury by appealing the FCC's "automatic" denial in sufficient time before the scheduled AETN staged debate.

In this case the FCC confuses the people whom it serves with the licensed entities it is charged with regulating and the doctrine of exhaustion with the fundamental rule that:

"All laws which are repugnant to the Constitution are *null and void.*"

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 174, 176; 2 L.Ed 60 (1803)
Norton v. Shelby County, 118 U.S. 425, 442
16th American Jurisprudence, 2d., Section 256

The FCC, which can give no remedy to the Plaintiff, would also cut off all redress to the Courts. On the one hand, the FCC, which gave only a *de facto* "order" in this case says, "... a court of appeals would not have jurisdiction to entertain a suit arising under the Federal Communications Act in the absence of a FCC order" (at 26); but, on the other hand, the FCC wants to have it both ways by also claiming the district court has no jurisdiction because *the court of appeals has exclusive jurisdiction.*

B. The Exhaustion Doctrine Whether Applicable Against The Gillett Licensee or Not, *Is Not Applicable Against Plaintiff Forbes*

The exhaustion doctrine is inapplicable against Forbes for each and all of the following reasons:

[1] There is no "relief is available from the agency" for any of the Plaintiff's claims.

[2] The Gillett case resembles the KHOG Defendants' ac-

tions in that the ABC affiliated Defendants censored ads they opposed based on content *even though the content had been approved by the FCC,** the agency that is charged with regulating the KHOG Defendants.

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*"FCC staff's August 1992 ruling ... addressed an earlier advertisement by Becker, which had already been broadcast, and found that the advertisement *was not indecent.*" FCC Gillett Brief at 32.

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[3] The exhaustion doctrine is inapplicable against Forbes because the KHOG censorship resulted from a last minute FCC ruling at the end of the business day on Friday, October 30, 1992. (FCC Gillett Brief at 11) The ruling was worded in such a way that licensees who opposed Pro-Life candidates, such as Plaintiff Forbes, could falsely use it as a pretext to censor approved ads* *even though everyone involved knew the ruling did not and could not lawfully infringe against the FCC approved ads.* {Plaintiff's Amended Complaint at 3-6, Attachment Exhibits #s 16, 17 & 18} The FCC was not open for business until Monday, November 2nd, *the day before the election.* Even if the FCC were to forthwith order all offending licensees who wrongfully used the irrelevant October 30th Gillett ruling to run the ads *it would be too late to have righted the irreparable wrongs.* The exhaustion of time was of the FCC's and the Defendants' own making. (47 C.F.R. §73.1944 (b) provides: *Weekend Access.)*

[4] While it is true that "the FCC is charged with administering the reasonable access and no censorship requirements of Sections 312(a)(7) and 315. It is the Courts of Law that enforce the Constitution and mandate and enjoin state agents such as the FCC and AETN to obey the Constitution and Laws.

[5] The FCC claims to be the "experienced administrative agency long entrusted by Congress with the regulation of broadcasting, and the Commission is responsible for implementing and enforcing § 312(a)(7) of the Communications Act."

Our Founding Fathers warned us about putting blind trust in any men or governmental agency. They said eternal vigilance

was the price of liberty and that even the best of men had to be bound by the chains of the Constitution. For most of its history the FCC did its job well. In fact its chief officials forewarned us time and again against exactly what this Complaint and Appeal remonstrates against. (*e.g., 25 F.C.C.2d 216, 232.*)

As for putting the fate of the freedom in the hands of present FCC "experts" on Free Speech and Equal Protections and Due Process, Plaintiff poses this question:

What would be the state of America and the world today if our technological progress were left in the hands of these past examples of bureaucratic expertise?

(1 In 1899, the Director of the U.S. Patent Office, Charles H. Duell, in his expert wisdom profoundly declared: *"Everything that can be invented has (already) been invented."*

(2 In 1903 the patent office rejected the Wright brothers' patent for an airplane, because these bureaucrats assuming the role of infallible scientific experts declared it was *"a device that is inoperative or incapable of performing its intended function."*

[6] It is beyond dispute that the relief that Congress provided for deprivations of rights through 28 *USC 1331, 1343, 42 USC 1983, 1985*, et seq. is to be obtained from the Courts of Law, not the FCC. This Court, not the FCC, is fully and uniquely competent to award the relief law and justice demand. Please see Plaintiff's **Appeal from "Order to Dismiss,"** pp 13~32.

[7] The FCC's and Defendants' attempt to end-run the Constitution and the Court's jurisdiction threatens and undermines the people's authority and rights to informed self-government.

[8] Plaintiff Forbes has an unshadowed right to pursue this case because:

(A) There is clear evidence that exhaustion of administrative remedies will result in irreparable injury;

(B) The agency's jurisdiction over the Constitution and the People is plainly lacking; and

(C) the agency's special expertise will be of no help on the question of its jurisdiction.

There can be no question that the Court has clear juris-

diction over the constitutional and statutory subject matter of Forbes's complaint. The FCC simply ignored the plain language and clear intent of the laws.

[9] Because the FCC acted quickly against Becker does not change the fact that the FCC told Forbes they would *not* act in his case until after the election. If anything it shows that the FCC is capable of acting quickly *if it wants to.* In the *Gillett* case, the FCC had a strong interest in "proving" that "Gillett obviously had plenty of time in which to seek emergency FCC relief,"

[10] Nor can the FCC's and Defendants' attempt to circumvent the Constitution and laws be excused by any suggestion that resort to the FCC would not have been futile.

[11] The FCC claims that "the licensee is not required under Section 315(a) to air that advertisement outside the 'safe harbor' period[2]" even when there has been no FCC ruling on the ad. The FCC thus claims to have the power to do what the Courts have prohibited: exercise prior restraint against speech.

Yet, even though the FCC purports to grant this power of censorship to licensees, the FCC itself does (not yet) claim the absolute power to exercise prior restraint:

> 2 The October 30th ruling did not involve a determination as to whether the advertisement in question, which had not been aired, was legally indecent. The FCC's current policy is to refrain from rendering indecency rulings in advance of broadcast." at 32

It is apparent that *the real reasons* the FCC acted so quickly *re Becker*, even if it violated prohibitions against prior restraint, were to: (1) deny Becker's second ad even before a determination; (2) give licensees throughout the nation *a pretext to harm Pro-Life candidates' chances for election in the current congress;* and (3) short-circuit Gillett's "shortness-of-time" argument.

While it is true "Congress has entrusted implementation of the fair access and no censorship provisions of the Act to the FCC," including the power "to enforce these provisions by revoking Gillett's license;"

Even if the FCC were to revoke the licenses of Gillett *and*

AETN and KHOG, etc., this would provide no remedy for the irreparable harm done to Plaintiff and the People of Arkansas.

The FCC admits the present scheme is not working well, to say the least. It claims to have initiated "public comment proceedings" on these issues. The FCC "opined that these issues 'present extremely difficult questions that would best be resolved with the benefit - of full public comment.'"

Plaintiff is one member of the "public" who has not been invited by the FCC to comment, and Plaintiff "opines" that very few persons, if any, of the public (other than licensees or their counsel) in the 3rd congressional district of Arkansas and far less than 1% of the People who constitute the American Public have been invited by the FCC to comment on these "extremely difficult questions."

The Constitution, the First, Fifth and Fourteenth Amendments and the law, including *47 USC 312 & 315*, have already "pre-judged" "the rights of candidates" and mandated the FCC's duties to enforce the law against violations and unequal, discriminatory, capricious or malicious transgressions. The Constitution has effectively given the Courts jurisdiction to protect the rights of the people and to compel governmental agencies and agents to obey the Constitution and inferior laws.

Quoting the FCC Brief at 34: "Under the All Writs Act, *this Court has jurisdiction to review any FCC failure to act promptly and would likewise have full jurisdiction to enter any other order necessary* to protect" the inalienable, fundamental rights of the people and the plaintiff. (28 USC §1651)

THEREFORE, from all of the above, this honorable Court, not the FCC has jurisdiction in (this) case and this Court should order summary judgment in Plaintiff's favor forthwith.

* * *

PLAINTIFFS' RESPONSE - III -

To The FCC's Brief From The University of Houston, et al., Defendants-Appellants v. Gertrude *Barnstone*, et al., Plaintiffs-Appellees.

STATEMENT OF THE ISSUE

(This) case is ***NOT*** "whether the First Amendment prohibits a television station licensed to a government entity from deciding not to broadcast a particular program."

But rather (this) case is a question of whether the Constitutions and laws of the United States and the State of Arkansas, respectively, including the Fourteenth, Fifth and First Amendments prohibits a television station licensed (by the FCC) from censoring viewpoints, unlawfully discriminating against persons and classes of person and denying the people their paramount right to be an informed electorate.

Factually, *Barnstone* is so different from (this) case as to be irrelevant, but the FCC's Brief in that case yields some telling points.

Ironically, the FCC's case is predicated upon the FCC-revoked *Fairness Doctrine*.

"FAIRNESS:" The FCC's "SUMMARY OF THE ARGUMENT" at 8

"The Federal Communications Commission administers a scheme of broadcast regulation which carefully balances the rights of both broadcasters and the public. While *broadcasters are required to present programming* which satisfies the needs of their communities and *which, under the Fairness Doctrine, presents contrasting viewpoints on controversial issues of public importance,* broadcasters are also accorded wide editorial discretion in achieving those goals."

The FCC used its self-described "great expertise" to "greatly disrupt the carefully balanced scheme of broadcast regulation," which "as a practical matter, diminishes, rather than enhances, the First Amendment rights of viewers." Therefore, this Court should vacate the order of the court below and hold that broadcast stations ... must afford equal access and opportunities to candidates and not censor free speech.

The FCC's "ARGUMENT" at 9 says:
"I. *THE DELICATELY BALANCED SCHEME* OF BROAD-

CAST REGULATION ADMINISTERED BY THE FCC IS CAREFULLY DESIGNED TO PROTECT THE FIRST AMENDMENT RIGHTS OF BOTH BROADCASTERS AND THE PUBLIC.

"The statutory scheme of broadcast regulation has always been inspired by First Amendment values." See *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 122 (1973). (This was *after* the FCC pledged never to "discard" Fairness; (*but*) before the FCC discarded Fairness.)

Plaintiff asks, then ***why*** did the "entrusted" FCC use its "great expertise" to destroy this "delicately balanced scheme ~ inspired by First Amendment values."?

Ironically, in the footnote at 10 the FCC argues that licensees may not unlawfully discriminate ...

" 5/ License renewal may be denied for failure to broadcast programming to meet the community's needs. See Alabama Educational Television Commission, 50 FCC 2d 461 (1975), where the licensee, a state instrumentality, was denied renewal for its eight television stations *because it discriminated against blacks in its programming.*"

The FCC says at 11-12:

"In addition to *the fundamental duty of broadcasters* to offer programming which is responsive to the needs of their communities, the Commission, with subsequent *specific* -12- *congressional approval,*7/ *has developed the Fairness Doctrine.*

7/ The 1959 amendments to Section 315(a), the political broadcasting provision, included the following sentence:

"*Nothing in the foregoing sentence shall be construed as relieving broadcasters,* in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, *from the obligation imposed upon them under this Act* to operate in the public interest and *to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.*

Act of Sept. 14, 1959, §1, 73 Stat. 557, 47 U.S.C. /315(a). See also *CBS, supra*, 412 U.S. at 110 n.8.

"This Doctrine *requires broadcasters* (1) 'to devote a reas-

onable percentage of their broadcast time to the presentation of news and programs devoted to the consideration and discussion of public issues of interest in the community...' *Report on Editorializing by Broadcast Licensees*, 13 FCC 1246, 1249 (1949), and (2) *to afford 'reasonable opportunity for the presentation of contrasting viewpoints' on controversial issues of public importance. Fairness Report*, 48 FCC 2d 1, 10 (1974), *aff'd in part and rev'd in part sub nom. National Citizens Committee for Broadcasting v. FCC*, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978)." @12

The existence of the Fairness Doctrine is particularly important in considering whether the public forum doctrine should apply to broadcasting stations. The Supreme Court *was referring to the Fairness Doctrine* when it said:

> 'Those [public forum] decisions provide little guidance, however, in resolving the question whether the First Amendment requires the Commission to mandate a private right of access to the broadcast media. In none of these cases did the forum sought for expression have the affirmative and statutory obligation to provide full and fair coverage of public issues, such as Congress has imposed on all broadcast licensees.'
>
> *CBS v. DNC*, 412 U.S. 94, 129-30"

This of course was back when the FCC agreed with the Supreme Court that *the Fairness Doctrine was seen by Congress as the "ultimate check" over ... licensees.* @ 13

The FCC admits that "public forum" decisions provide little guidance in resolving private right of access. But in any case this ... case is *not* a quest for "private" right of access, but a fight for the right of *paramount public access,* constitutional and statutory mandated access and equal protection of the law.

(*Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975; *Office of Communication of the United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966))

The Fairness Doctrine runs through the FCC's *Barnstone* brief like a life line. Thus, when FCC reversed itself on Free Speech and Equal Access and revoked this vital, "ultimate"

congressionally sanctioned Fairness Doctrine, it "eviscerated the carefully developed scheme by which Congress, the courts, and the FCC have accommodated the First Amendment rights of broadcasters and viewers" and "spelled the end of public broadcasting as it existed" when *Barnstone* and *Muir*, etc. were decided. The public's access to "social, political, esthetic, moral, and other ideas," *Red Lion, supra*, 395 U.S. at 390, has inevitably been diminished, rather than enhanced, as a result.

The First Amendment should not be read to abridge Free Speech, *but to protect it.*

In his classic essay, "*Politics and the English Language,*" George Orwell translated a once familiar biblical passage into the bureaucratic jargon that has displaced the clear language that our forefathers used to communicate great thoughts:

> "Objective consideration of contemporary phenomena compels the conclusion that success or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must invariably be taken into account."

Here's the older, clearer version:

"I returned and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to the men of understanding, nor yet favour to men of skill; but time and chance happeneth to them all." Ecclesiastes 9:11

In the King James tongue, that truth is discernible. Likewise, in the Constitution, The Declaration, the Federalist Papers, Blackstone, Montesquieu, etc., the truth is crystal clear for those who have eyes to see; but the mountains of "regulations," the bureaucratic "interpretations" of their own red tape, enshrouded in obnoxious oxymorons, grinding out with monotonous repetition from the "Ministries of Truth," the FCC, hides the light in the gross darkness of Orwellian "double-think."

The soul of our Bill of Rights has been enervated, the meaning obscured, the simple made abstruse, and any repair

to History, Principle and Truth are branded as heresy, punished as political psychosis or ridiculed as outmoded anachronisms that have no place in the "politically correct" new world order that seeks to supplant our Republic.

Yes, those with the usurped powers still pay lip service to the bedrock principles they have reduced to meaningless mantras and insipid slogans. Even as they silence, suppress, censor and control the mass media, they hypocritically mutter what they have transmogrified into nothing but tired, old, but comforting shibboleths: "Free Speech is the power of the media-meisters to impose Censorship 'for the public's paramount interest'!" "All are Equal, but some are much more Equal than others!" And all the other solemn idiocies of the politically correct politburo.

Why not surrender our God-given Rights to them? Why not let them decide for us what we are supposed to think? Why not forfeit the right to choose how to live our own lives to those who claim to have "expertise" above and beyond us ordinary mortals, including the Framers, and the Constitution they bequeathed to us? It's so much easier than thinking.

Or contesting for one's rights against all but impossible odds.

Why not? Because, "*the only thing necessary for evil to triumph is for good men to do nothing.*"

Edmund Burke, Letter to William Smith, January 9, 1795

Because: The attempts by the FCC and all of the other self-anointed nomenklatura to rationalize their tyrannical usurpations in the name of "free speech," if not challenged and stopped, will pervert the sacred to the profane, crush Liberty under despotism, and twist every virtue into vice with worm-tongued deceptions, "like whited sepulchres full of dead bones, all uncleanness, hypocrisy and iniquity."

Woe To Those Who Call Evil Good, *And Good Evil;* Who Substitute Darkness For Light *And Light For Darkness;* Who Substitute Bitter For Sweet, *And Sweet For Bitter!* Isaiah 5:20 (NASB)

Woe to those who ... justify the wicked for a bribe, And take away the rights of the ones who are in the right!
Isaiah 5:23 (NASB)

Woe to those who enact evil statutes, And to those who constantly record unjust decisions, So as to deprive the needy of justice, And rob the poor of My people of [their] rights, In order that widows may be their spoil, And that they may plunder the orphans. Isaiah 10:1,2 (NASB)

Why not surrender? Because: When the wicked rise to power, people go into hiding; but when the wicked perish, the righteous thrive. Proverbs 28:28 (NIV)

"Is life so dear or peace so sweet as to be purchased at the price of chains and slavery? Forbid it, almighty God. I know not what course others may take, but as for me, give me liberty or give me death."

Patrick Henry,
Speech in Virginia Convention, Richmond, March 23, 1775

* * *

Choose you this day whom you will serve ...
But As For Me And My House, We Will Serve The Lord.
Joshua 24:15

Therefore, from all of the foregoing, both (of) the FCC Briefs re *Gillett* and *Barnstone* support Plaintiff's Cause at every relevant point, and Plaintiff is entitled to Summary Judgment on the Constitution and record before this Court.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person

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CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I have sent a copy of the Opposition to FCC "Amicus" Brief this 7 day of September, 1993, to the following Defendants, interested persons and/or their attorneys at the following addresses:

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s/ Ralph P. Forbes

RALPH P. FORBES

APPENDIX Z

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WA

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION
COMMUNICATIONS NETWORK
FOUNDATION, et al.,
APPELLEES,

MEMORANDUM BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

"A NATION THAT IS AFRAID TO LET ITS PEOPLE JUDGE THE TRUTH AND FALSEHOOD IN AN OPEN MARKET IS A NATION THAT IS AFRAID OF ITS PEOPLE."

JOHN FITZGERALD KENNEDY

COMES NOW, RALPH P. FORBES, APPELLANT in the above styled matter and respectfully petitions this Court for Rehearing *en banc* as to portions of its Judgment and Opinion issued April 28, 1994, and apologizes to this honorable Court for his inefficient presentations to the Court, in apparently failing to properly show the facts, law and issues in important parts of this matter.

This is **not** an "FCC" case. ***This is a Civil Rights case in which all Rights secured by the Constitution are inextricably implicated.***

This is **not** a case "to enforce *47 U.S.C. §315*." It ***is*** a case to enforce the Constitution including the Bill of Rights and the 14th Amendment and seek appropriate redress for those injured under law.

It is true that originally emergency injunctive relief "to enforce *47 U.S.C. §315*" was sought on several occasions. However, once the damage was done, neither the defendants, nor the FCC, not even this Court had any injunctive powers to grant "relief with respect to it to have any meaning."

Nevertheless, "The underlying case is not moot."

Finding of Eighth Circuit Court's Order in this matter dated December 22, 1992.

The several preliminary petitions for enforcement of *47 USC § 312, 315* all became moot after the election; the claim for reparations for violations of rights became (or *should* have become) germane and central at that time.

The *only* relevance of *47 USC § 312, 315* in this matter now is *primarily because the defendants misused them to color their violations, denial and deprivation of constitutionally protected rights "under color of law;"*

And, secondarily, because the defendants violated these statutes enacted to regulate them and to protect the public and citizens from precisely the kind of acts complained of in this matter. *

* Licensed broadcaster *must* "conduct himself as a proxy or fiduciary" "to present the views ... *which would otherwise be barred from the airwaves.*"

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367; 389 S.Ct.. 1794, 1805; 23 L.Ed2d 371 (1969)

However, because of the premature "dismissal with prejudice" out of jurisdiction; and the "FCC" clamour of the defendants and the numerous "amici," including the FCC itself, I was forced into a defensive posture countering all the "FCC" diversions and distractions, so the focus of the contest was never properly directed to the fundamental, paramount constitutional questions. For not being sharp enough to counter this strategic misdirection, I apologize to this Court; and I shall use this request for Rehearing to bring the real issues into focus.

KEY ISSUES & SELECTED CITATIONS

In respect to the statutory claims, the Court said it agrees with the District Court and the private stations that the com-

plaint cannot stand. (Opinion of April 28, 1994, at 6) This is what I believe must be reconsidered, but long hours of searching through the letter (there was no opinion, finding of fact nor conclusion of law by the District Court) based upon *DeYoung*, now reversed by this Court; the briefs of the defendants, etc., I am unable to find with any degree of reasonable certainty what is the basis for the bald statement, the Complaint cannot stand.

Unlike the dissenting opinion which outlines the answer for the defendants, there are no specifics, no findings of fact nor conclusions of law, no guide lines for the plaintiff to debate or follow.

Therefore, I am forced to present my case for rehearing on intuition, a sort of legal blind man's bluff. However, I believe that looked at in the light of what this case really is about, the Constitution and self government by a free people vs. a police state ruled by arbitrary permission in accordance with the politically approved views of the hour; and *not* a case of FCC procedures, then virtually every case cited in my briefs submitted in this matter, no matter how inadequately presented, require that the Complaint *must* stand.

"As the Supreme Court unanimously held in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367; 89 S.Ct. 1794; 23 L.-Ed.2d 371 (1969):

'It is the right of the viewers and listeners, not the right of the broadcasters *which is paramount.* It is the purpose of the First Amendment *to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail,* rather than to countenance monopolization of the market, whether it be by the government or a private licensee. *It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here.* ***That right may not constitutionally be abridged.'***

Red Lion, at 395 U.S. at 390, 89 S.Ct. at 1806 (by reference all the citations used by the Court.)

"... ('[S]peech concerning public affairs is more than self-expression; *its is the essence of self-government.')* Self-government suffers *when those in power suppress competing*

views on public issues... First Nat'l Bank of Boston v. Bellotti,
435 U.S. 765; 98 S.Ct. 1407; 55 L.Ed.2d 707 (1978)

"It is particularly important that candidates have the ... opportunity to make their views known so that the electorate may intelligently evaluate the candidate's personal qualities and positions on vital public issues before choosing among them on election day."
Buckley v. Valleo, 424 U.S. 1, 52, 53 (1976)

"* * * It is thus apparent that the right to vote in federal elections is a right of national citizenship protected from conspiratorial interference by 42 U.S.C. § 1985(3)."
Means v. Wilson, 522 F.2d 833 at 838 (8th Cir. 1975) citing;
Griffin v. Breckenridge, 403 U.S. 88, 106;
91 S.Ct. 1790, 29 L.Ed.2d 338 (1971)
United States v. Classic, 313 U.S. 299, 314-315,
61 S.Ct. 1031, 85 L.Ed. 1368 (1941)
Ex Parte Yarbrough, 110 U.S. 651, 658-662,
4 S.Ct. 152, 28 L.Ed. 274 (1884)

"Today we hold that 42 USC § 1985(3) protects the right to vote in ... elections against interference from private conspiracies as well.

"Since the right to vote in a system of representative government is one of the essential trappings of citizenship protected by the Constitution, we hold that Congress has necessarily granted it to the plaintiffs, and in a proper case, interference with the right to vote ... may be vindicated under 42 U.S.C. § 1985(3) as a deprivation of equal protection of the laws or equal privileges and immunities under the law."
Means v. Wilson, 522 F.2d 833 at 839 (8th Cir. 1975)

The record and the appended Affidavits of fact clearly show that *like Russell Means, I sought relief [through ... channels] and was denied an effective timely remedy.*

"* * * We express no view of whether exhaustion of tribal remedies is a prerequisite of federal relief ... because we find that

the plaintiffs made every reasonable attempt to exhaust their ... remedies. . . We find that plaintiffs have done all they could to exhaust ... remedies in this case, but their right ... has been frustrated by inaction ... 'The plaintiffs sought relief [through ... channels] and were denied an effective timely remedy.' " *Brown v. United States,* 486 F.2d 658, 661 (8th Cir. 1973).

Means v. Wilson, 522 F.2d 833 at 837 (8th Cir. 1975)

I am respectfully requesting equal application of the laws as accorded by this Court to Brown, Kwoun and Means, et seq., in equal or similar circumstances.

Community Television of So. California v. Gottfried, 459 U.S. 498 (1983) was a case seeking to invoke the Rehabilitation Act to mandate special broadcasting technologies for the hearing impaired. Factually, the case is not relevant to the present case, *but it is of particular note there was no question that plaintiff had a private cause cause of action and a remedy at law under the Communications Act.*

"Our cases have firmly established that (constitutionally protected rights do) not necessarily rest on the Fourteenth Amendment, and (claims are) assertable against *private* as well as governmental interference. *Shapiro v. Thompson,* 394 U.S. 618, 629-631, 89 S.Ct. 1322, 1328-1330, 22 L.Ed.2d 600; *id.,* at 642-644, 89 S.Ct. at 1335-1336 (concurring opinion); *United States v. Guest,* 383 U.S. 745, 757-760 and n. 17, 86 S.Ct. 1170, 1177-1180, 16 L.Ed.2d 239; *Twining v. New Jersey,* 211 U.S. 78, 97, 29 S.Ct. 14, 18, 53 L.Ed. 97; *Slaughter-House Cases,* 16 Wall 36, 79-80, 21 L.Ed. 394; *Crandall v. Nevada,* 6 Wall 35, 44, 48-49, 18 L.Ed. 744; *Passenger Cases (Smith v. Turner),* 7 How. 283, 492, 12 L.Ed. 702 (Taney, C.J., dissenting).

The Supreme Court decided in 1971 to "*accord the words of the statute their apparent meaning*" and held section 1985-(3) *provided a civil remedy for damages against wholly private infringements of constitutionally protected rights.*

Griffin v. Breckenridge, 403 U.S. 88, 97; 91 S.Ct. 1790, 1795; 29 L.Ed.2d 338, 345 (1971)

Ultimately, the Courts have jurisdiction over administrative actions.

Shaughnessy v. Pedreiro, 349 U.S. 48; 75 S.Ct. 591; 99 L.Ed 868; *Wong Yang Sun v. McGrath*, 339 U.S. 908

Re *Wong Yang Sun* please see Plaintiff's *Appeal from Order to Dismiss* at 24 and 25.

NEW CASE

National Organization of Women v. Scheidler, 92-780 decided *unanimously* by the Supreme Court January 24, 1994, demonstrates that the Court strongly adheres to a very literal interpretation and construction, that *statutes mean what they say,* not what may or may not be read into them or implied, such as "if *42 USC 315* was not specifically included under 'any' in *42 USC 1983* then defendants may use it with impunity to violate the Constitution and the rights of anyone less equal."

Furthermore, extending section 1985(3) protection to include conspiracies motivated by nonracial class animus comports favorably with the Supreme Court's approach to other Reconstruction civil rights statutes in recent years *to "accord [them] a sweep as broad as [their] language."*

Griffin v. Breckenridge, 403 U.S. 88 at 97; 91 S.Ct. 1790 at 1796; 29 L.Ed.2d 338 at 345 (1971) ...

There shall be: "Civil Action For Deprivation of Rights" for "*Every* person who, *under color of any* statute, ordinance, *regulation*, custom or usage* ... subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of *any* rights, privileges or immunities *secured by the Constitution and laws,* shall be liable to the party injured *in at action at law,* suit in equity, or other proper proceeding *for redress ...*"

Title 42 USC, Section 1983

*It does ***not*** say "except for *42 USC 312* and *315*."

DEPRIVING PERSONS OF RIGHTS OR PRIVILEGES

If one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another person is injured in his person or property,

or deprived of having and exercising any right or privilege of a citizen of the United States, *the party so injured or deprived* ... (*must waive his constitutionally protected rights and beg an unelected FCC bureaucrat to be judge, jury and executioner even though such bureaucrat is without any power to repair damages to the injured party) ...

*Nay, it says: "*may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.*"

Title 42 USC, Section 1985 (3)

"*** and such *damages may be recovered in an action on the case;* ***" *Title 42 USC, Section 1986*, et seq.

Thus, I respectfully submit that a literal reading of the statutes entitles me my day in court. I also respectfully submit that a thorough study of congressional intent as to both the Title 42 and the Title 47 statutes invoked further strengthen and enforces my contentions as to what ever weight the Court may give them.

This Court correctly found in *Means v. Wilson* that two groups of *the same* tribe of American Indians were classes within the ambit of these section by virtue of their *political* differences:*

"... in our opinion, the reasoning above quoted was and is valid in the light of *Griffin.* The group of plaintiffs in this case, by their affirmative acts of supporting plaintiff (by petitions, votes, etc.) ... were a class against whom ... the defendants discriminated against because of their class membership. This brings their complaint within the ambit of 42 U.S.C. § 1985(3). *Cameron v. Brock,* 473 F.2d 606, 610 (6th Cir. 1973)."

Means v. Wilson, 522 F.2d 833 at 840 (8th Cir. 1975)

This Court also properly applied the statutes in *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) in which worshippers at a predominantly white Catholic church were disrupted by black civil rights protestors.

A plaintiff may opt for a jury trial in an action founded upon *Bivens v. Six Unknown Fed Narcotics Agents*, 403 U.S.

388; 29 L.Ed.2d 619; 91 S.Ct. 1999, in which it was recognized that in some circumstances the victims of a violation of the Federal Constitution ... have a right to recover damages ... in federal court *despite the absence of any statute conferring such a right.* [Italics added]

Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468; 64 L.Ed.2d 15

"* * * **Federal courts have the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has *explicitly* indicated that such remedy is not available."**

Brewer v. Hoxie School District No. 46, 238 F.2d 91 at 98 (8th Cir. 1956) (Emphasis supplied.)

As the language of the statutes state plainly on their face, and more fully shown in Plaintiff's *Appeal from Order to Dismiss* at 14 - 32.

"* * * [W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."

Bell v. Hood, 327 U.S. 678 at 684, 66 S.Ct. 773 at 777, 90 L.Ed. 939 (1946)

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2002,2004, 91 S.Ct. 1999 (1971)

Action v. Gannon, 450 F.2d at 1238 (8th Cir. 1971)

See also, *Bemis Bros. Bag Co. v. United States*, 289 U.S. 28, 36, 53 S.Ct. 454, 457, 77 L.Ed. 1011 (1933) (CARDOZO, J.); *The Western Maid*, 257 U.S. 419, 433, 42 S.Ct. 159, 161, 66 L.Ed. 299 (1922) (HOLMES, J.)

"*** (Bureaucratic regulations) may not authorize federal agents (nor private persons) to violate the (Constitution). *Byers v. United States*, 273 U.S. 28, 47 S.Ct. 248, 71 L.Ed. 520 (1927); *Weeks v. United States*, 232 U.S. 383, 386, 34 S.Ct. 341, 342, 58 L.Ed. 652 (1914); *In re Ayers*, 123 U.S. 443,

507 8 S.Ct. 164, 183-184, 31 L.Ed. 216 (1887)

"Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty. See *Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984 (1932); *Nixon v. Herndon,* 273 U.S. 536, 540, 47 S.Ct. 446, 71 L.Ed. 759 (1927); *Swafford v. Templeton,* 185 U.S. 487, 22 S.Ct. 783, 46 L.Ed. 1005 (1902); *Wiley v. Sinkler,* 179 U.S. 58, 21 S.Ct. 17, 45 L.Ed. 84 (1900); {A long line of authorities re the Fourth Amendment here are cited by reference by plaintiff.}

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2004, 91 S.Ct. 1999 (1971)

"For we have here no explicit congressional declaration that persons injured by a ... violation of the (First and Fourteenth Amendments) may not recover money damages from the (defendants), but must instead be remitted to another remedy, equally effective in the view of Congress. The question is merely whether petitioner, if he can demonstrate an injury consequent upon the violation ... of his (constitutionally protected) rights, is entitled to redress his injury through a particular remedial mechanism normally available in the courts." {Supporting citations by reference.}

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2005, 91 S.Ct. 1999 (1971)

"In such cases there is no safety for the Citizen, except in the protection of the judicial tribunals, for rights which have been invaded by the officers of the government, professing to act in its name. There remains to him but the alternative of resistance, which may amount to crime."

United States v. Lee, 106 U.S. 196, 219, 1 S.Ct. 240, 259, 27 L.Ed. 171 (1882)

In his concurring opinion Justice HARLAN argued that federal courts have the power under a grant of jurisdiction to imply a federal remedy for the enforcement of a constitutional right; the power to award damages for violation of "constitutionally protected interests" and he agreed "with the Court that *a traditional judicial remedy such as damages is appropriate to the vindication of the personal interests protected by the (First) Amendment.*" (Italics supplied)

J. HARLAN contended the courts should protect rights: "Thus, in suits for damages based on violations of federal statutes, lacking any express authorization of a damage remedy, this Court has authorized such relief where, in its view, damages are necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *J.I. Case Co, v. Borak,* 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964); *Tunstall v. Brotherhood of Locomotive Firemen & Enginemen,* 323 U.S. 210, 213, 65 S.Ct. 235, 237, 89 L.Ed. 187 (1944). *Cf. Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201-204, 88 S.Ct. 379, 385-387, 19 L.Ed.2d 407 (1967).

"... *But I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.*" {Emphasis supplied.}

This is especially so when the absence of effective, alternative remedies renders the constitutional command a "mere 'form of words.' "

"The *Borak* case is an especially clear example of the exercise of federal judicial power to accord damages as an appropriate remedy in the absence of any express statutory authorization of a federal cause of action. There we "implied"- from what can only be characterized as an "exclusively procedural provision" ... **We did so in an area where federal regulation had been singularly comprehensive *and elaborate administrative machinery had been provided.***"
{Emphasis supplied.} *Bivens*, Footnote 4

"... then it seems to me that the same statute {28 U.S.C. § 1331(a)} is sufficient to empower a federal court to grant a traditional remedy at law as well as equity.
Please see n. 6 in *Bivens* at 2009

"... For people in {Forbes'} shoes, it is damages or nothing... Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatically close the courthouse door solely on this basis, we implicitly place a value judg-

ment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of recognition of otherwise sound constitutional principles... it is important in a civilized society, that the judicial branch of the Nation's government stand ready to afford a remedy in these circumstances.

Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 91 S.Ct. at 2006-2012, 91 S.Ct. 1999 (1971)

"The courts cannot rightly prefer, of the possible meaning of words of the Constitution, that which will defeat rather than effectuate the constitutional purpose."

United States v. Classic, 313 U.S. 299

This would be much more eloquent if my cause were defended by someone who perhaps opposed me and my views. But, unfortunately no such champion has come forth and it is speak for myself or surrender all that I hold dear and true. This I cannot do. It is true that this is an extremely difficult case for *anyone* to win, and that I, a non-lawyer, against a formidable array of specialists would be a tiny David against an enormous Goliath. Nevertheless, I believe a fair reading of the pleadings, the supplementary affidavits, entitle me to at least procedural discovery rights and the right to present my case to a jury; and that if they had done these things to anyone else, with other political views, less potent political and powerful opponents, etc., whether Bill Clinton, Russell Means, Jesse Jackson, Sheffield Nelson, etc., (as unlikely that some of them would be treated as "equally" as others) they, if discriminated against and their rights blatantly violated, would (and should) have their day in court.

There is a pervasive double standard and selective indignation throughout the media and certain elitist elements in our society. It is so imbedded that many cannot see the 2x4 in their own eye for the speck in the other's eye; but, the silenced majority sees the dual yardsticks all too clearly, and this bodes ill for the nation, like a pressure cooker or a volcano without a safety valve. In voluminous cases the Supreme Court, including *Opinion of Supreme Court of The United*

States in Planned Parenthood of Southeastern Pennsylvania, et a., v. Casey, Governor of Pennsylvania, et al., No.s 91-744 & 91-90, at 26 and *Olmstead v. U.S.*, 277 U.S. 438 at 485 (19-28), et seq., has stated the Courts have a clear duty to maintain the sense of justice and fair play the people require.

On the one hand scandalous, unsupported allegations against a judicial nominee with views similar to the plaintiff's are treated by the media as if they were holy writ; on the other hand, similar corroborated charges against a politician whose views are generally favored by the media are treated as if they were blasphemy or *lese majesty*. Free speech demands the media be allowed to treat these matters in a heavy handed, biased matter if they so choose; but the Constitution and laws require the Courts to insure that all persons and all view points, with special accords to those who may be unpopular because of latent bias, be afforded fair and even handed treatment under law. If I am allowed to express my views equally with my opponents I may or may not win elections. Win or lose, the nation is strong enough to endure my exercise of free speech and equal protections of the laws. But if my views, *or anyone else's are allowed to be suppressed* under any pretexts, *then the nation will be doomed to become a police state, by whatsoever title or name, and after a greater or lesser period of tyranny, society will collapse in anarchy bringing chaos that could dwarf the nightmares of Bosnia or Rwanda.*

By analogy I ask the Court to consider the old "South African Universal Suffrage Act," which allegedly guaranteed all persons (who met certain criteria) the right to vote and to compete equally in elections in South Africa. Supposedly the law guaranteed equal opportunities for all candidates to express their views to the public; however, all state licensed broadcasters routinely denied access to challengers of the regime. The state violated its own laws, by illegally and semi-secretly using taxpayers' monies to influence and control *even the privately owned mass media.* Injured opposition candidates could appeal to the "Commission of Free Speech," but the commission always delayed their rulings until after the elections and they always ruled against the challengers, creating an impressive line of precedents.

Theoretically, the afflicted opposition candidates could appeal to the courts once they exhausted all of their police remedies; but then the courts held the laws didn't mean what they said because the state had already provided means for grievances through its policing agencies and vicious cycles of hoops, endless loops and hopeless mazes. In the end, as in the case of the Soviet empire, even the most repressive police state measures, high technology, etc., could not maintain a regime that was no longer in touch with the people of the land.

Perhaps those who enforced these "laws" blinded themselves to injustice by telling themselves what they were doing was for "the good of society;" *but looked at objectively, such a system is abhorrent, indefensible and reeks with hypocrisy.*

Yet, are we not in the position of David, whose anger was greatly kindled when judging the words of Nathan the prophet? {II Samuel 12:1~15} God have mercy on us if our consciences are so seared we are beyond feeling the shame David felt when the truth of Nathan's words struck home:

America, *Thou* art the Nation! The God of Heaven has blessed thee with Laws, Justice, Righteousness, Liberty and Plenty! But thou has squandered thine inheritance, despised Justice and sold thy birthright for a mess of pottage! Woe unto the hypocrites, who strain at gnats while swallowing camels, who call good evil and darkness light, *for the parable against South Africa describes the "politically correct" suppression and police state bureaucracy that is supplanting the Constitution and the rule of the Law of the Land! Thou* art *that* Nation being weighed in the balances and found wanting! *Repent and restore Justice in the land while the Hand of the Lord God of Israel is yet stayed in mercy!* O America, *Thou* art the Nation!

---

* Section 1983 makes no specific reference to race, and a wide variety of nonracial classes have sought and won relief from discriminatory treatment under section 1983. Since section 1985(3), like section 1983, is not cast in racial terms, consistency demands that section 1985(3) also be read to protect nonracial classes."

See, e.g., Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); and *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992) Nos. 91-155 and 91-339

May God, "the Supreme Judge of the world,"* Whom our Founding Fathers relied upon with a firm belief in "the protection of Divine Providence,"* Whom they declared endowed us with both life and certain "unalienable rights," have mercy upon this Court and upon this Land, so that the people may rejoice and truly Proclaim Liberty throughout the Land.

***The Unanimous Declaration of Independence** of the United States in Congress, July 4, 1776

Wherefore, Petitioner prays that this Court will reconsider its opinion re "Statutory Claims" against all Defendants;

And, that at the least this Court will order the district court to revoke its untimely, wrongly decided order dismissing this case with prejudice.

Respectfully submitted,

s/ Ralph P. Forbes

Ralph P. Forbes
In his own proper person,

Box 88
London, AR 72847
501/293-4641

APPENDIX Z-1: Affidavit of Facts re KHOG/KHBS private Commercial Licensee Defendants Attachment to Memorandum Brief Petition for Rehearing

In supplement to the allegations verified in the amended complaint I wish to amend and clarify my charges against the KHOG Defendants as follows:

The defendants are privileged licensees regulated by the FCC and appropriate statutes and regulations, including *42 USC 312* and *315* which require them to afford equal opportunities to all candidates, and forbids them to censor the candidate's expressions.

In regard to the particular censorship in this case, the footage which the defendants objected to in the Forbes' ad was *specifically and expressly approved for use in such ads by the FCC.*

Both the FCC and the Supreme Court have categorically forbade the defendants from censoring political ads:

"Similarly, we cannot accept petitioners' suggestion that broadcasters be permitted to classify political use material as indecent so that they may restrict the time at which it airs even where it meets the Commission's indecency definition. Nor can we permit a broadcaster to alter the scheduling of such material because the broadcaster finds it otherwise "unsuitable" for children. **Such channeling would violate a federal candidate's reasonable access rights under Section 312 (a) (7) of the Act,** *which requires broadcasters to permit legally qualified candidates "reasonable access" to their facilities.* As a general matter, broadcasters may not direct candidates to unwanted times of the day or evening ... They cannot be banned from entire day parts ... *Therefore, the practice of channelling material that is not indecent (i.e., the Forbes' ad) ... would deprive federal candidates of their rights to determine how best to conduct their campaigns.* See *CBS, Inc.*, 453 U.S. 367 (1981)

FCC 8210-AJZMJM of 21 August, 1992, pp 2,3.

Mr. Cunningham was aware of all this. The more laws I showed him the more hostile he became. He made it very

plain, the laws, the Constitution, the Supreme Court, the FCC, nothing made any difference: he was determined to censor my ads regardless of anything.

This censorship was deliberately timed so that irreparable harm would take place on the crucial Friday, Saturday and Sunday preceding the national elections; and so neither myself nor any other candidate with similar beliefs who was similarly censored could contact any authority, whether the FCC or the courts for redress until Monday morning, the day before the election. Even though the horse was long gone, the FCC would not be able to lock the barn door until long after the election. Thus, on Monday, the day preceding the election I amended the original pleadings to include the KHOG defendants. (47 C.F.R. § 73.1944(b) provides: *a licensee shall make its facilities available for use by federal candidates on the weekend before the election*; and *licensees shall not discriminate between candidates with regard to weekend access.*)

That afternoon while serving copies of the complaint upon management in Fayetteville, I offered to drop the suit against them if they would afford me equal time to express my views on the eve of the election. They laughed and repeated many times that "all's fair in love and war." They said everyone was "scared" I would be elected and that there was a general consensus amongst all "responsible" media in the area that my candidacy be "blacked out," and they boasted it would work to defeat me. They admitted that it was not "ignorance" of my candidacy that kept me out of the "debate" on their commercially staged "debate," but rather a calculated decision that I was "too dangerous" to allow the voters to hear me and my views. They admitted they really didn't know nor care what my views really are. They invited me to come to their post-election coverage, and said they would give me "lots" of coverage *after* the polls closed. I told them I neither liked nor desired publicity or notoriety, but that I saw it was a price to pay as my civic duty to bring to light ideas and concepts that are suppressed.

Subsequently, I have been informed that certain KHOG defendants attempted to persuade other broadcasters to join

them in suppressing my "last minute" ads.

Most Recent Case of Failure of the FCC "remedies"

This week I had occasion to speak with Michael Bailey, a former Republican candidate for congress in Indiana's 9th district. Bailey supplied me with the FCC approved footage in 1992. In 1992 Bailey's ads were not censored and he won the primary by 2:1 ratio. This year Bailey's ads were censored, and he lost. On or about April 5th Bailey appealed to the FCC for an emergency hearing so they would direct the stations to broadcast the Bailey ads containing the FCC approved footage. The election is now over, and Bailey still has not got a ruling from the FCC.

Once more, the FCC's touted "comprehensive enforcement mechanism for protection of a federal right," has miserably broken down and served merely as an obstruction of justice, a mechanism to deny justice by delaying justice, an evil deception designed to destroy those very rights it pretends to protect "under color of law."

Alas, no matter what the FCC decides, it cannot order a new election in which the electorate shall have their paramount rights to be fully informed enforced. The FCC cannot restore rights nor order restitution for irreparable damages and trespasses and violations of the most sacred rights. *Can the FCC award plaintiffs monetary damages? Can the FCC usurp the judicial powers delegated to the Courts by the Constitution?*

The uniform factual record is: *The FCC scheme is not an adequate remedy at law! Worse,* ***the FCC scheme has been perverted into a conspiracy to deprive the people of self government based on enlightened self interest under color of law.*** (*cf.* 126 a)

The FCC would not or could not protect the Constitution and the people's rights. Once again, after irreparable harm has been done to the most substantive, fundamental rights of the people, the FCC is perpetually powerless to restore, in the words of the 8th Circuit Order of December 22, 1992, "relief

with respect to it to have any meaning." The FCC has no remedy, *indeed the "cure" is invariably fatal.* It is clear, the sole remedy under law lies alone within the courts, not the administrative powers of the FCC.

I lodged complaints against the KHOG/KHBS defendants with the FCC immediately following their illegal censorship against me in November of 1992. The FCC has filed briefs against my position and in favor of the defendants as "amicus" in this matter; yet to this day I have heard nothing, after almost two years, re my very serious complaints against the KHOG and/or the AETN state defendants.

Further Affiant sayeth not.

s/ Ralph P. Forbes

Ralph P. Forbes
in propia persona,

Rt 3, Box 341
Russellville, AR 72801
501/293-4641

VERIFICATION

State of Arkansas
SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

s/ Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this 25 Day of May, 1994.
My Commission expires June 30, 1996.
s/ Karen P. Forbes

Karen P. Forbes
Notary Public

APPENDIX Z-2: Affidavit of Facts re AETN State Defendants Attachment to Memorandum Brief Petition for Rehearing

Contrary to the State's surprise change of position from "From Forbes had no rights" to that I "sat on my rights" (Oral argument, August 31, 1993);

[1] I notified the AETN Defendants that I had overcome the State's unnecessarily burdensome requirements and was a qualified candidate for United States Congress for the 3rd district of Arkansas and requested my equal rights to present my views in the "debates" arranged, sponsored, set up, advertised and eventually broadcast by the State defendants. [2] The AETN State defendants denied my request to be afforded equal opportunities, so [3] I called the FCC in Washington DC to ask them to enforce the laws and protect my rights. The FCC representative was not sympathetic to my plight, advised me not to pursue the matter, told me the FCC procedure could not and would not give me an answer until long after the "debate" and the election were past; and in any case the FCC would deny me and uphold the AETN. When I asked if the FCC could expedite the matter by giving me its foregone conclusion so I could have something to appeal to the U.S. Courts he became very hostile and told me not to waste my time bucking the system.

[4] My repeated requests to the AETN state defendants and the FCC were all denied at all times until the present time. [5] On the eve of the debate the only redress and remedy at law known to me was a law suit together with a motion for expedited injunctive relief. [6] This motion was denied immediately without benefit of hearing by U.S. District Judge Franklin Waters.*

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*The extreme hostility and prejudice by Judge Waters against plaintiff at all times, including dismissing this matter with prejudice while it was still in the jurisdiction and custody of this Court was a mystery until plaintiff discovered Judge Waters had had a fiduciary arrangement with one James B. Blair, *aka* Jim Blair, husband of one of the defendants in this matter, AETN Commissioner Diane Blair. Petitioner believes Mrs. Blair has subsequently been ap-

pointed by another defendant, William Jefferson Clinton, to the Board for the Corporation for Public Broadcasting, de facto one of the so-called "amici" pooling their resources with the defendants against the plaintiff.

Mr. James B. Blair is also a defendant in another case, *Forbes and the People v. Dr. Harry F. Ward*, presently before the Supreme Court of the State Arkansas, in which plaintiff in this matter is also the chief plaintiff.

At the very least Petitioner believes the cannon of judicial ethics would have required Judge Waters to recuse rather than eagerly dismissing the case with prejudice while it was in the jurisdiction of this honorable appellate Court.

---

[7] I immediately appealed for an Emergency single Judge Hearing. At the first single judge hearing in Judge Richard S. Arnold's chambers I offered to call the FCC and ask the same questions to see if the answers would be the same, but the AETN State Defendants vigorously objected.

The animosity of the AETN state defendants against plaintiff and his views has been expressed in many ways, including [A] Mr. Gene Goss publicly vowing to broadcast re-runs of "St. Elsewhere" in place of the debates of this honorable Court ordered him to include Forbes in the debate. [B] The hostility by Mr. Goss against not only Forbes but the UCA students who protested against censorship by the AETN State Defendants. [C] The desire to expend the resources of the State suppressing my views rather than grant me even second class "equality."

The Chandler (*Chandler v. Georgia Public Telecommunications Commission*, 917 F.2d 486 [11th Cir 1990]) case was somewhat mitigated by the fact that the PBS defendants offered "separate but equal" opportunities to the censored candidates whose views they were discriminating against. In this case, I was much more interested in expressing my views than fighting endless court battles against great odds, so [8] I offered to accept a separate and inherently, unequal opportunity to express my views to the people; but, [(9)] the hostility of the AETN defendants was so great they would rather expend state and court resources rather than allow even a

tiny portion of the electorate to hear even a few minutes of Forbes' uncensored free speech.

[(10)] Thereupon, I petitioned for additional emergency hearings before this Court and have been doing my best to vindicate my rights and the rights of the people so vilely violated by the AETN State Defendants ever since.

Further Affiant sayeth not.

s/ Ralph P. Forbes
Ralph P. Forbes
in propia persona,
Box 88
London, AR 72847
501/293-4641

VERIFICATION

State of Arkansas/SS County of Pope

I, Ralph P. Forbes, verify that the information contained herein is true and correct to the best of my knowledge and belief.

/s Ralph P. Forbes
Ralph P. Forbes

Subscribed and affirmed before me this s/ 25 Day of May, 1994.
My Commission expires June 30, 1996.

s/ Karen P. Forbes
Karen P. Forbes
Notary Public

APPENDIX A-A

THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Case No. 93 -1031 -WAFS

RALPH P. FORBES AND THE PEOPLE
APPELLANTS,
v.
ARKANSAS EDUCATIONAL TELEVISION COMMUNICATIONS NETWORK FOUNDATION, et al.,
APPELLEES,

PETITION TO RECALL MANDATE WITH EXPEDITED CONSIDERATION

COMES NOW, RALPH P. FORBES, APPELLANT in the above styled matter and respectfully petitions this Court to recall its mandate in the above styled matter for the following reasons:

1. Plaintiff believes he has good and sufficient cause to appeal that portion of the April 28, 1994, Order of this Court as to the commercial defendants;

2. Plaintiff has been seeking assistance of counsel to either represent his interests or as amicus. There is a wide interest in this case, all of which has produced a wide variety of interpretations as to how that portion of the Order pertaining to the commercial defendants is to be interpreted and what it means.

3. For example, Ms. Rita Spillenger of the ACLU, who has expressed interest in the AETN aspect of the case, believes the order as to the commercial defendants bears totally on the exhaustion of administrative procedures; and that your petitioner can proceed to vindicate his rights against the commercial de-

fendants once this process is "exhausted." If this reading and interpretation is correct, and depending upon further specification and clarification, an appeal may not be necessary.

JUSTICE DELAYED *IS JUSTICE DENIED*

It has been almost two years since I lodged a written complaint to the FCC re the commercial defendants' violation of the FCC rules, Title 47 U.S.C., et seq.; and even though the FCC has had time to appear on the defendants' behalf as amicus they have yet to respond to the prima facie violations by the defendants.

(Please see attachments.)

Therefore, Plaintiff requires answers to the following questions:

Q-1-A. Will the statute of limitations in this case expire while the FCC slowly slogs through its ponderous process?

Q-1-B. Or will the computation of time commence when the FCC finally decides to exhaust its administrative process?

Q-2. If the computation of time commences after the FCC's final decision, which has already squandered a congressional election cycle, much to the defendants' advantage and to the plaintiffs' irreparable hurt, what can compensate to obtain a fair and balanced trial if the FCC takes another year or two or three or ten or twenty or forever to respond and "exhaust" its procedures?

Q-3. If the FCC decides the commercial defendants violated the law, and because I and all Citizens and persons are entitled to a remedy at law, what redress or reparations can the FCC provide to me and to the voters for the injuries suffered by the defendants' actions?

Q-4. If the FCC decides the commercial defendants are constrained by the law and the clear language of their own regulations, and I am at last free to seek justice in the courts; then am I compelled to file an original action in the circuit court as

per the Hobbs Act, 28 U.S.C. 2342?

Q-5. If I must bypass the district court, am I then compelled to surrender my right to jury trial as guaranteed by the Bill of Rights?

4. Plaintiff respectfully reiterates part (*iv*) of his Petition for Rehearing:

"PLEASE TAKE NOTICE Petitioner in the above styled matter intends to appeal 'Part II, A. Statutory Claims' at 6 and 7 of the Order of April 28, 1994 if he is not successful in this Petition for Rehearing. Your Petitioner believes pursuant to the right to appeal and due process he requires a particular and sufficient *finding of fact and conclusion of law* from this honorable Court."

5. Plaintiff requires and believes he is entitled by law to [1] clarification of this honorable Court's Order as to the commercial defendants;

And [2] a finding of fact and conclusion of law as to that portion of the Order pertaining to the commercial defendants.

6. Rule 13 of the Supreme Court of the United States limits the time to petition for writ of certiorari to ninety [90] days from the date of denial of the petition for rehearing, in this case June 21st, 1994.

7. Plaintiff cannot properly begin to formulate his appeal without specificity of his status vis-a-vis the commercial defendants; and particulars of the grounds for this portion of the Court's decision. Therefore, plaintiff requires [1] a finding of fact and conclusion of law and [2] a clarification of the questions presented in this petition; just as I was at a loss to know the basis for the Court's opinion re certain "Statutory Claims" and was forced to play a game of legal "blind man's bluff" in my petition for rehearing re this same matter.

8. Thus, plaintiff is caught between the proverbial rock and the hard place; the clock is ticking but he is denied due process, being forced to appeal against what to him appears to be an ambiguous result resting on vague, inexplicit or nonexist-

ent underpinnings.

Wherefore, for all of the above reasons plaintiff/appellant respectfully requests that this honorable Court give expeditious consideration to this Petition and recall its mandate and provide your petitioner with its finding of fact and conclusion of law and clarifying answers to the foregoing questions of important questions of law and constitutional consequence.

Respectfully submitted,

s/ Ralph P. Forbes
Ralph P. Forbes
In his own proper person
Box 88
London, AR 72847
501/293-4641

CERTIFICATE OF SERVICE

I, RALPH P. FORBES, certify that I have sent a copy of the foregoing including the Memorandum Brief, List of Applicable Citations and Affidavits to Defendants and/or their counsel this 6th Day of July, 1994, at the following addresses:

Mr. Tom Gay
Attorney General's Office Senior Assistant
323 Center St., 200 Tower Bldg.
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Mr. Robert L. Jones, III
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s/ Ralph P. Forbes

RALPH P. FORBES

APPENDIX B-B
The True Rule of Reason & Authoritative Case Law

... Because the statutory obligation of a Court of Appeals may be defeated by an agency that fails to resolve disputes, a Circuit Court may resolve claims of unreasonable delay in order to protect its future jurisdiction. *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 593 (D.C.Cir. 1971); *see also Dean Foods*, 384 U.S. at 603, 86 S.Ct. at 1742 (quoting *McClellan v. Carland*, 217 U.S. 268, 280, 30 S.Ct. 501, 504, 54 L.Ed. 762 (1910)

(" '[W]e think it the true rule that where a case is within the appellate jurisdiction of a higher court a writ ... may issue in aid of the appellate jurisdiction which might otherwise be defeated...' ").29

29. *Cf. PEPCO (Potomac Electric Power Co. v. ICC)*, 702 F.2d at 1032-33 (premising appellate jurisdiction over claims of unreasonable agency delay on a slightly different rationale - postponement of an unreasonable delay claim until after the agency's decision may render it moot and deprive the Court of Appeals of the opportunity to review the delay claim, thus permitting present review under the All Writs Act). {Which is *precisely* what happened in Forbes' case} *e.g.*, (App. 17a).

TRAC, 750 F.2d 70 at 76 (App D.C., 1984)

[13] In the context of a claim of unreasonable delay, the first stage of judicial inquiry is to consider whether the agency's delay is so egregious as to warrant mandamus. Although this court has decided several cases involving claims of of unreasonable delay, *see, e.g., PCHRG v. FDA*, 740 F.2d 21, (D.C.Cir. 1984); *Public Citizen Health Research Group v. Auchter*, 702 F.2d 1150 (D.C. Cir. 1983); *PEPCO*, 702 F.2d 1026 (D.C. Cir. 1983); *MCI Telecommunications Corp. v. FCC ("MCI")*, 627 F.2d 322 (D.C.Cir. 1980); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975), we have not articulated a single test for when the writ should issue. On reading these cases together, however, one can discern the hexagonal contours of a standard. Although the standard is hardly ironclad, and sometimes suffers from vagueness, it nevertheless provides useful guidance in assessing claims of agency delay: (1) the time agencies take to make decisions must be governed by a "rule of reason," *PEPCO*, 702 F.2d at 1034; *MCI*, 627 F.2d at 340; (2) where Congress has

provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply context for this rule of reason, *PCHRG v. FDA*, 740 F.2d at 34-35; *PCHRG v. Auchter*, 702 F.2d at 1158, n. 30; *PEPCO*, 702 F.2d at 1034; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; *PCHRG v. FDA*, 740 F.2d at 34; *PCHRG v. Auchter*, 702 F.2d at 1157; *see also Blankenship v. Secretary of Health, Education and Welfare*, 587 F.2d 329, 334 (6th Cir. 1978); (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority, *see, e.g., PCHRG v. FDA*, 740 F.2d at 34; *PCHRG v. Auchter*, 702 F.2d at 1158; (5) the court should also take into account the nature and extent of the interests prejudiced by delay, *PCHRG v. FDA*, 740 F.2d at 35; and (6) the court need not "find any impropriety lurking behind agency lassitude in order to hold that agency action is 'unreasonably delayed.'" *PCHRG v. FDA*, 740 F.2d at 34.

TRAC, 750 F.2d 70 at 79, 80 (App D.C., 1984)

Similarly, court has jurisdiction to hear and determine matter where company seeks relief from FTC action allegedly depriving it of its constitutional right to fair and impartial decision on the merits, notwithstanding assertion by FTC that court lacks jurisdiction over subject matter due to failure of company to exhaust administrative and judicial remedies provided ... *Lehigh Portland Cement Co. v. Federal Trade Com.*, (1969, CA4) 416 F.2d 971; Four-year delay by NLRB in issuing final order ... is unreasonable and must be taken into account when court fashions remedy. *Texas Petrochemicals Corp. v. NLRB*, (1991, CA5) 923 F.2d 398;

Plaintiff may proceed under 5 USC § 706 for court determination as to whether final decision has been unreasonably delayed because ... Act neither specifically provides for nor precludes actions to compel agency action unreasonably delayed. *Cal-Almond, Inc. v. Yeutter*, (1991, ED Cal) 756 F.Supp. 1351; *cf. La Bonne v. Heckler,* (1983, DC Minn) 574 F.Supp.... 1016, dismissed without opp. (CA8 Minn) 732 F.2d 161 and later proceeding (DC Minn) 580 F.Supp. 558; 47 USC § 414 does not preclude common-law action against telephone company. *Kaplan v. ITT-U.S. Transmission Systems, Inc.*, 589 F.Supp. 729 (ED NY, 1984)

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act {The Urgent Deficiencies Act was incorporated in 47 U.S.C. § 402(a)} would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in *Powell v. United States, supra; cf. A.F. of L. v. Labor Board*, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347. The Powell case likewise repudiated the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. *See also Western Pacific C.R. Co. v. Southern Pac. Co.*, 248 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160; *Clairborne-Annapolis Ferry Co. v. United States*, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808.

CBS v. U.S., 316 U.S. 407, 419-420, 62 S.Ct. 1194, 1201, 86 L.Ed 1563 (1942)

CBS, id., is a case where allegations show a *threat* of irreparable injury to *a licensee's business*; this was *sufficient,* this Court said, to give standing for judicial review of FCC non-order, and "is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed ..." 316 U.S. 423, 62 S.Ct. 1203

* * *

Thus, it is futile to require a parent to pursue administrative remedies when state officials are not willing to hold a hearing. *Kerr Center Parents Assoc. v. Charles*, 897 F.2d 1463 (9th Cir. 1990). Nor is there any point to pursuing administrative remedies when the agency has *a priori* decided.

Zobrest v. Catalina Foothills School District, 963 F.2d 1190, 1193 n.2/reversed (9th Cir. 1992); ___ U.S. ___, 113 S.Ct. 52, 121 L.Ed.2d 21 (1993).

In *Shah v. Quinlin*, 901 F.2d 1241 (5th Cir. 1990), the 5th Circuit held that a pro-se prisoner should be permitted to amend his complaint to allege exhaustion of administrative remedies in light of the intransigence of prison officials. In this

case, even assuming that there is a requirement of exhaustion of administrative remedies, there is an important and signal fact question as to whether in the instant case such an application would be futile. The Circuit Court erred in not requiring the District Court to determine the truth of these allegations by the petitioner. Nor can there be any doubt, having found a cause of action, as to the ability of the courts to grant plenary relief as demanded by the circumstances.

* * *

Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Police Dept. of Chicago v. Mosley, 408 U.S. 92 at 96; 92 S.Ct. 2286 at 2290, 33 L.Ed.2d 212 (1972)

That the discrimination is among entire classes of ideas, rather than among points of view within a particular class, does not render it any less odious. Subject matter or content censorship in any form is forbidden. Mr. Justice BRENNAN, STEWART, MARSHALL and POWELL joining in dissent in *Lehman v. City of Shaker Heights*, 94 S.Ct. 2714 at 2724, 418 U.S. 298 at 317, 41 L.Ed.2d 770 (1974)

"[A] function of free speech under our system of government is to invite dispute . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."

Terminiello v. City of Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949)

A policy, however well meant, to give access to whatever is good for the community, unless in the judgment of the (defendants), it is injurious ..., is not in any legal or practical sense limited, but is selection, and if based on word content, censorship.[5] In fact some might think that excluding (petitioner Forbes' views) while permitting all else "would demonstrate not neutrality but hostility towards (petitioner Forbes' views)."

See Board of Education v. Mergens, __ U.S. __, 110 S.Ct. 2356, 2371, 110 L.Ed.2d 191 (1990).

[5] It is, of course, of no consequence that defendant does not discriminate on the basis of the particular ... viewpoint, but only on the subject. *Carey v. Brown*, 447 U.S. 455, 462 n.6, 100 S.Ct. 2286, 2291 n. 6, 65 L.Ed.2d 263 (1980).

Grace Bible Fellowship v. School Admin. Dist. 5, 941 F.2d 45 at 48 (1st Cir. 1991)

cf., Lamb's Chapel v. Center Moriches School District, 113 S.Ct. 2141 (1993)

* * *

While newspapers are essentially different (*Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 94 S.Ct. 2831, 41 L.Ed.2d 730), from the *necessarily* regulated broadcast media, nevertheless the Court has said:

... It would be strange indeed however if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom... That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. *Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.* The First Amendment affords not the

slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity. {Italics supplied.}

Associated Press v. United States,
326 U.S. 1, 20, 65 S.Ct. 1416, 1424-1425

A free press is indispensable to the workings of our democratic society. The business of the press (much more so the privileged radio and television licensees who are granted the power to use portions of the public domain) ... is the promotion of truth regarding public matters by furnishing the basis for an understanding of them. Truth and understanding are not wares like peanuts and potatoes. And so, the incidence of restraints upon the promotion of truth through denial of access to the basis for understanding calls into play considerations very different from comparable restraints in a cooperative enterprise having merely a commercial aspect. I find myself entirely in agreement with Judge Learned Hand that "neither exclusively, nor even primarily, are the interests of the newspaper industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." 52 F.Supp. 362, 372.

... The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. *A public interest so essential to the vitality of our democratic government may be defeated by* private *restraints no less than by public censorship.*

{Italics supplied.}

Associated Press v. United States,
326 U.S. 1, 28-29, 65 S.Ct. 1416, 1428

* * *

With respect to securities regulation, this Court has found that 15 USC §78n(a) authorizes a private right of action for one defrauded by a false security prospectus, even though the statutory law does not unequivocally grant such power. *J.I. Case Co. v. Borak*, 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed2d 423 (1964). *Private enforcement* of the proxy rules *provides a necessary supplement to Commission action. Id.*, at 377 U.S. 432, 84 S.Ct. 1560; We, therefore, believe that under the circumstances here, *it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the Congressional purpose. Id.*, 377 U.S. 433, 84 S.Ct. 1560

Similarly, in *Superintendent of Insurance of The State of New York v. Bankers Life & Casualty*, 404 U.S. 6, 92 S.Ct. 165, 30 L.Ed2d 128, (1971), the Court held §17(a) of the Securities Act of 1933, 48 Stat. 84, 15 USC §77q(a) and §10 of the Securities Act of 1934, 48 Stat. 891, 15 USC §78j(b) to confer on a corporation cause of action for fraud or deceit in the sale of securities, though it was their own insiders who perpetrated it, and *though the Acts, on their face, do not address the subject.*

Again, in *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed2d 1189 (1968) *the Court recognized a cause of action under 42 USC §1982* to a prospective home buyer for injunctive relief against a racially discriminatory seller.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed2d 386 (1969) *monetary damages were available against a private corporation* which refused to recognize a transfer of membership rights in a neighborhood corporation providing recreational benefits because of the assignee's race: We hold in *Jones v. Alfred H. Mayer Co.* that *although §1982 is couched in declaratory terms and provides no explicit method of enforcement, a federal court has power to fashion an equitable remedy. Id.*, 396 U.S. at 238, 90 S.Ct 405

Thus, 42 USC §1983, likewise, provides and confers a private cause of action.

In *Allen v. State Board of Elections*, 393 U.S. 544, 89 S.Ct 817, 22 L.Ed2d 1 (1969) *private citizens were allowed to sue under the Voting Rights Act*, 79 Stat. 437, 42 USC §1973, *et seq.*

The achievement of the Act's laudable goal could be severely hampered, however, if each citizen were required to depend solely on litigation instituted at the discretion of the Attorney

General. For example, the provisions of the Act extend to States - *and the subdivisions thereof.* {Emphasis in original} The Attorney General has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government. *It is consistent with the broad purpose of the Act to allow the individual citizen standing* to insure that his city or county government complies with the §5 approval requirements. *We have previously held that a federal statute passed to protect a class of citizens, although not specifically authorizing members of the protected class to institute suit, nevertheless implied a private right of action.*

Allen, Id., 393 U.S. at 556, 557; 89 S.Ct at 827 citing *J.I. Case Co. v. Borak.*

Petitioner would argue that *Cort v. Ash*, 422 U.S. 66, 95 S.Ct 2080; 45 L.Ed2d 26 (1975) (no private right of action under federal law) and *Touche Ross & Co. v. Redington*, 442 U.S. 550, 99 S.Ct 2479, 61 L.Ed2d 82 (1979) (no private right of action under disclosure requirements of securities law) are not in point and are not controlling because they do not confer specific rights upon identifiable parties as does §315(a).

* * *

Any person whose right to vote was impaired by conduct of defendants had standing to sue. *Gray v. Sanders*, 83 S.Ct. 801

Prisoner was not required to pursue futile administrative remedies with respect to §1983. *Goar v. Civilletti*, 688 F.2d 27 (6th Cir 1982);

In *Doty v. Carey*, 626 F.Supp. 359 (N.D. Ill. 1936) parents were not limited to wrongful death statute when police shot their sleeping son in his own bed. Citing *Hishon v. King & Spalding*, 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed2d 59 (1984) the court agreed that a motion to dismiss may be granted only when relief would not be available under any set of facts consistent with the allegations; and for purposes of such a motion the court must accept all such allegations as true, at 360.

When alternative remedy is insufficient or inconsistent with the meaning and purpose of §1983 ***the court must fashion a remedy from common law.*** See *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Bass by Lewis v. Wallenstein*, 769 F.2d 1173, 1183 (7th Cir.

1985); Bell, 746 F.2d at 1234. Id. at 362; *cf., Wong Yang Sung v. McGrath*, 70 S.Ct. 445, 339 U.S. 33; *Bivens, supra.*

42 USC § 1983 provides private remedial cause of action if there is state deprivation of right secured by federal statute, unless state actor demonstrated express provision or other specific evidence from statute itself that Congress intended to foreclose such private enforcement; When tenants complained that respondents were circumventing the Brooks Amendment to the Housing Act of 1937 by over-billing them for utilities the case was dismissed by the district court. Dismissal was affirmed by the circuit court; but this Court reversed and declared:

We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for deprivation of federally secured right. {Italics supplied}

Wright v. Roanoke Redevelopment & Housing Authority, 479 U.S. 418 at 422, 107 S.Ct. 766 at 770 93 L.Ed.2d 781, (1987) Citing *Smith v. Robinson*, 468 U.S. 992 at 1012, 104 S.Ct. 3457 at 3468, 82 L.Ed.2d 746 (1984).

Thus, §1983 claims are inherently different from statutory claims: As courts have recognized, however, statutory section 1983 claims differ significantly from implied private rights of action. *Samuels v. District of Columbia*, 770 F.2d 184, 194 (D.C. Cir. 1985)

Maine v. Thiboutot, 448 U.S. 1, 100 S.Ct. 2502, 65 L.Ed2d 555 (1980) held that §1983 was available to enforce violations of federal statutes by agents of the state.

Title VII is not exclusive remedy for employment discrimination and action may be brought under §§ 1983 and 1985. Both Fourteenth Amendment and Title VII grant public sector employees right to be free of employment discrimination; plaintiff may sue her state government employer for violations of Fourteenth Amendment through § 1983 and escape Title VII's comprehensive remedial scheme ...

Ratcliff v. Milwaukee, (1986, CA 7 Wis) 795 F.2d 612

Title VII (42 USC §§ 2000e et seq.) does not preempt action under 42 USC § 1983 for violation of Fourteenth Amendment.

Roberts v. College of Desert, (1988, CA9 Cal) 861 F.2d 1163

Terminated employee's 42 USC § 1983 action was not preempted by (comprehensive remedial scheme) where defendant's conduct allegedly violated (specific federal law) and separate

constitutional rights of of employee, where employee's speech ... was protected under First Amendment.

Johnston v. Harris County Flood Control District, (1989, CA5) 869 F.2d 1565

Court's erroneous findings Title VII (42 USC §§ 2000e et seq.) action did not preclude subsequent jury trial on 42 USC § 1983 claims on basis of collateral estoppel.

Farber v. Massillon Bd. of Educ., (1990, CA6 Ohio) 908 F.2d 65; *Brown v. Hartshorne Public School Dist.*, (1988, CA10 Okla) 864 F.2d 680; *Walters v. Western State Hospital*, (1988, CA10 Okla) 864 F.2d 695

Medicaid Act (42 USC § 1396a(a)(13)(A)) created right in action under 42 USC § 1983. *Wilder v. Virginia Hosp. Assn.*, (1990, US) 110 L.Ed.2d 455, 110 S.Ct. 2510; *Virginia Hospital Asso. v. Baliles*, (1989, CA4 Va) 868 F.2d 653

National Guard Technicians Act did not preempt relief under § 1983, inasmuch as Congress did not intend such result.

Johnson v. Orr, (1986, CA3 NJ) 780 F.2d 386; *cf.*, Wong Yang Sung v. McGrath, 70 S.Ct. 445, 339 U.S. 33

Availability of injunctive remedy under 42 USC § 2000a does not preclude recovery of monetary damages under 42 USC 1985(3). *Fisher v. Shamburg*, (1980, CA10 Kan) 624 F.2d 156

Exhaustion of administrative and state court remedies is not prerequisite for jurisdiction. *Hazard v. Weinberger*, (1974 S-D NY) 382 F.Supp. 225, affd without op (CA2 NY) 519 F.2d 1397

42 USC § 1983 provides express private right of action to enforce 23 USC § 301, proscribing tolls on federally funded bridges. *Clallam County v. Department of Transp.*, (1988, CA9 Wash) 849 F.2d 424; *See, e.g., West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250, 101 L.Ed2d 40 (1988) in which a private contract physician for prisoners is subject to §1983.

Foster parents had private cause of action under 42 USC § 1983 to enforce rights under Social Security Act (42 USC §§ 620-628 and §§ 670-676).

Timmy S. v. Stumbo, (1990 CA6 Ky) 916 F.2d 312.

See also: *Artist M. v. Johnson* (1990 CA7 Ill) 917 F.2d 980; *Pelfresne v. Williams Bay*, (1990, CA7 Wis) 917 F.2d 1017; *Carelli v. Howser*, (1991, CA6 Ohio) 923 F.2d 1208; *Planned Parenthood of Billings, Inc. v. Montana*, (1986, DC Mont) 648 F.Supp. 47; *Dodds v. Simpson*, (1987, DC Or) 676 F.Supp. 1045; *Willis v. Bell*, (1988, ND Ill) 687 F.Supp. 380; *Rothschild v. Grottenthaler*, (1989, SD NY) 716 F.Supp. 796

* * *

National Broadcasting Co. v. United States (NBC), 319 U.S. 190, 63 S.Ct. 997 (1943) was a narrowly decided case extending FCC authority beyond its primary jurisdiction of engineering and technical aspects to include regulation of contracts between *licensees and networks* but *not* setting a standard so indefinite as to confer unlimited power. Mr. Justice MURPHY, joined by Mr. Justice ROBERTS, dissenting said:

"I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But *we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted.* Since that is what the Court in substance does today, I dissent.

"In the present case we are dealing with a subject of extreme importance in the life of the nation. Although radio broadcasting, like the press, is generally conducted on a commercial basis, it is not an ordinary business activity, like the selling of securities or the marketing of electrical power. In the dissemination of information and opinion has assumed a position of commanding importance, rivaling the press and the pulpit. Owing to its physical characteristics radio, unlike the other methods of conveying information, must be regulated and rationed by the government. Otherwise there would be chaos, and radio's usefulness would be destroyed. But *because of its vast potentialities as a medium of propaganda, the character and extent of control that should be exercised over it by gov-*

ernment is a matter of deep and vital concern. Events in Europe show that radio may be readily a weapon of authority and misrepresentation, instead of a means of entertainment and enlightenment. It may even be an instrument of oppression. In pointing out these possibilities I do not mean to intimate in the slightest that they are imminent or probable in this country, but they do suggest that the construction of the instant statute should be approached with more than ordinary restraint and caution, *to avoid an interpretation that is not clearly justified by the conditions that brought about its enactment, or that would give the Commission greater powers than the Congress intended to confer.*" {Italics supplied.}

NBC, 319 U.S. at 227-228, 63 S.Ct. 1014-1015

If this reasoning bears any weight in the matter of contracts, how much more cogent is its admonition against bestowing powers of censorship to *anyone*, state or *private* actors, to control what the people are permitted and forbidden to hear when deciding on matters of "informed" self-governance.

... We noted that the Act permits the Commission to promulgate "such rules and regulations, ... *not inconsistent with law* ..."

FCC v. WNCN Listeners Guild, 101 S.Ct. 1266 at 1274, 450 U.S. 582 at 594, 67 L.Ed2d 521 (1981) *cf.*, 47 USC § 303(r)

* * *

The frequent repetition of a wrong will not make it right.

Amos v. Mosley, 74 Fla 555, 77 So. 619;
Kingsley v. Merril, 122 Wis. 185, 9 NW 1044

During the 1994 election cycle, a significant number of candidates or their counsels or supporters contacted petitioner re the 8th Circuit's very narrow, limited question of state censorship. Certainly not all such candidates heard of petitioner's case (or read between the distorted, sensationalist headlines); (b) nor is it likely that all of that limited class succeeded in contacting petitioner. Thus, this case is representative of a continuing invidious invasion against the rights of a free people, entrenching itself by custom, precedent and bureaucratic "catch 22" hazards; repetitive, yet evading review.

This is "a classic justification for a conclusion on nonmoot-

ness." It is "capable of repetition, yet evading review." This case is a justiciable controversy because "[t]he 'logical nexus between the status asserted and the claim sought to be adjudicated,' *Flast v. Cohen*, 392 U.S. at 102, 88 S.Ct. at 1953, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969, are both present."

Roe v. Wade, 410 U.S. 113 at 712, 93 S.Ct. 705 at 125 *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d (1969); *Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 1282, n.8, 39 L.Ed.2d 714 (1974); *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698, 704, 705, 116 L.Ed.2d 711 (1992)

Thus, the issue of the continued viability of the fairness doctrine with regard to ballot issues would never be resolved if we found this case to be moot.

Arkansas AFL-CIO v. FCC, 11 F.3d 1430 at 1436 (8th Cir. 1993)
Libertarian Party v. Bond, 764 F.2d 538, 539 n. 1 (8th Cir. 1985)

* * *

"What is the Constitution? It is no vague, indefinite, floating unsubstantial something. ... It is something substantial. It is a plainly written document, not in Hebrew nor in Greek, but in English, beginning with a preamble, fitted out with articles, sections, provisions, and clauses, defining the rights, powers, and duties to be secured, claimed, and exercised under its authority. ... It is a thing in itself; complete in itself; has a character of its own. ... It is a great national enactment."

Frederick Douglass, *The American Constitution and the Slave*, Glasgow, Scotland, March 26, 1860

His watchmen are blind: they are all ignorant, they are all dumb dogs, they cannot bark; sleeping, lying down, loving to slumber. Yea, greedy dogs which can never have enough, and they [are] shepherds [that] cannot understand: they all look to their own way, every one for his gain, from his quarter.

Isaiah 56:10,11 (KJV)

If even the Almighty's watchmen can fail to do their duty, then surely the Court must be ever wary of institutions and schemes that miscarry in their constitutional duties and limitations.

These practices contain numerous obstacles, which separately, and together, including those *restrictions based on time and procedural obstacles* create an "equal-access"-sabotaging-scheme which "in its totality" "operates to freeze the status quo" and effectively preclude non-anointed, independent and third party candidates and their viewpoints, which the eighth circuit found unconstitutional when used to "impose requirements or restrictions *based on time* ... which effectively prevented a third party ... candidate from ever [being heard]."

MacBride v. Exon, 558 F.2d 443 at 449 (8th Circuit, 1977)

Acts of defendants and the totality of the circumstances, the procedure and practice imposed and applied which has resulted in the denial and abridgement the right to vote, which give not only less opportunities than other members of the electorate to participate in the electoral process and elect representatives of their choice, but zero opportunities, qualifies petitioner and the thousands of qualified electors who petitioned for ballot access the status of a protected class under 42 USC 1973.

And this honorable high Court declared: A conspiracy against the right to run is as invidious as conspiracy against the right to vote.

U.S. v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed 1368 (1941)

The FCC's vitiated interpretations virtually preclude an excluded candidate from ever qualifying for equal access to express suppressed views, therefore they place "substantially unequal burdens on both the right to vote and the right to associate."

Williams v. Rhodes, 393 U.S. 23 at 31;
89 S.Ct. 5 at 10; 21 L.Ed.2d 24 (1968)

* * *

Let us contemplate our forefathers, and posterity, and resolve to maintain the rights bequeathed to us from the former, for the sake of the latter. The necessity of the times, more than ever, calls for our utmost circumspection, deliberation, fortitude and perseverance. Let us remember that *"if we suffer tamely a lawless attack upon our liberty, we encourage it, and involve others in our doom." It is a very serious consideration ... that millions yet unborn may be the miserable sharers of the event.*

Samuel Adams, *Speech* [1771]
Father of The American Revolution

No. 94-1566

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

RALPH P. FORBES & THE PEOPLE — PETITIONERS

vs.

AETN, KHOG, et. al. — RESPONDENTS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I.

The Court of Appeals did not err in holding that Mr. Forbes' failure to exhaust his administrative remedies with the FCC was fatal to his statutory claim against the private television stations and their manager or that a 42 U.S.C. 1983 remedy was unavailable.

II.

The Court of Appeals correctly held that petitioner's amended complaint did not state a cause of action under 42 U.S.C. 1985.

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CITATIONS OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Letter Opinion of the District Court of the United States District Court for the Western District of Arkansas dated December 16, 1992 was not published. It is found in Appendix Vol. 1, p.20a-25a. The decision of the Court of Appeals for the Eighth Circuit is reported at 22 F.3d 1423 (8th Cir. 1994) (En Banc) and was filed April 28, 1994 (App. Vol.1, p.1a-15a).

STATEMENT OF THE CASE

Petitioner, Mr.Forbes, by Amended Complaint filed November 2, 1992, included private television stations KHBS and its affiliate, KHOG, and Darrel Cunningham, the general manager of the stations, as Defendants. The substance of Forbes' Amended Complaint against these Defendants was that Cunningham refused to run a certain political television advertisement depicting the "products" of abortion except in such time slots designated as "safe harbor" hours. Forbes' Complaint sought relief pursuant to 42 U.S.C. 1983 and 1985 as a consequence of alleged censorship in violation of 47 U.S.C. 315.

On November 20, 1992, the stations and Cunningham filed a Motion to Dismiss based upon lack of subject matter jurisdiction and that Forbes had failed to exhaust his administrative remedies. After response by Mr. Forbes', filed December 4, 1992, the District Court by letter Opinion and Order dated December 17, 1992, granted the Motion to Dismiss and Forbes' appealed to the Eighth Circuit Court of Appeals. The Court of Appeals for the Eighth Circuit, En Banc, affirmed the dismissal of Forbes' Amended Complaint against the private stations and their manager, Mr.Cunningham, by its Opinion filed April 28, 1994.

ARGUMENT

I.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT MR.FORBES' FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES WITH THE FCC WAS FATAL TO HIS STATUTORY CLAIM AGAINST THE PRIVATE TELEVISION STATIONS AND THEIR MANAGER OR THAT A 42 U.S.C. 1983 REMEDY WAS UNAVAILABLE.

Under the Communications Act of 1934, 47 U.S.C. 151 et seq. Congress has expressly authorized the FCC to regulate the telecommunications industry. It has vested the FCC with authority to conduct administrative proceedings necessary to resolve matters arising under this mandate. Thus, under 47 U.S.C. 151, the FCC is charged with the duty to "execute and enforce the provisions of this chapter [47 U.S.C. Ch. 5]." Under 47 U.S.C. 154(j), the FCC is broadly authorized to "conduct its proceedings in such a manner as will best conduce to the proper dispatch of business and to the ends of justice."

47 U.S.C. 312, at issue in this litigation, outlines the power of the FCC to "revoke any station license or construction permit" and provides for such revocation "for willful or repeated failure to allow reasonable access to or to permit

purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified Federal candidate for Federal elective office on behalf of his candidacy." (47 U.S.C. 312(a)(7)) Prior to such a revocation, the FCC must serve upon the licensee a show cause order and permit the licensee to appear before the Commission. (47 U.S.C. 312(c)).

Section 315(a) (47 U.S.C. 315(a)) also involved in this litigation, provides that if the licensee should permit any legally qualified candidate for any political office to use the broadcasting station, then the licensee "shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station." Section 315(a) further provides that the licensee "shall have no power of censorship over the material broadcast under the provisions of this section." Section 315(c) instructs the Commission to "prescribe appropriate rules and regulations to carry out the provisions of this section."

The FCC is the agency charged with enforcement of the Section [47 U.S.C. 315] at issue. In fact, a few days before Mr.Forbes filed his Amended Complaint, the FCC issued a public notice with request for comments on whether broadcasters could "channel...into those hours when there is no reasonable risk of children being in the audience, candidate 'uses' that

present graphic depiction of dead or aborted and bloodied fetuses or fetal tissue." In the Matter of Petition for Declaratory Ruling Concerning Section 312(a)(7) of the Communication Act, FCC 92-486, MM Docket No.92—254. Thus, not only does the FCC have the exclusive jurisdiction to address the issue raised by Forbes' Complaint, it is currently considering this very question. The agency has informed Mr.Forbes of this fact. (Vol.1, App., p.68,69)

The Eighth Circuit Court of Appeals, En Banc, affirmed the District Court which had dismissed Forbes' statutory claims holding that there is no private cause of action to enforce 47 U.S.C. 315 and that Forbes had failed to exhaust his administrative remedies. Forbes, 22 F.3d 1423, at 1427, 1428.

A series of decisions have held that there is no private cause of action to enforce alleged violations of the Communications Act and that an individual claiming a violation of the statute must exhaust his administrative remedies.

In DeYoung v. Patten, 898 F.2d 628 (8th Cir. 1990), the Court held that there is no implied private cause of action under the Federal Communications Act and that claimed violations of the FCA are not enforceable under 42 U.S.C. 1983. In Belluso v. Turner Comm. Corp., 633 F.2d 393 (5th Cir. 1980), the Court

examined the role of the Federal Communications Commission in enforcement and implementation of the FCA. The Court concluded:

> "The existence of this pervasive statutory and administrative scheme is strong evidence that Congress intended the administrative remedy to be exclusive. Likewise...creation of a private cause of action would be inconsistent with the clear legislative intent to centralize enforcement of the Act in the expert agency." Id. at 397.

In Daly v. CBS, Inc., 309 F.2d 83 (7th Cir. 1962), the Court said:

> "There is no provision in Sec. 315(a), or in any other part of the Act, which gives a private individual a cause of action to recover damages for an alleged violation of the Act. In the twenty-eight years since the enactment of the Act, no court, as far as we are advised, has ever held that a private individual had a right of action against a licensee to recover damages for a violation of Sec. 315(a)." Id. at 85.

In Cyntje v. Daily News, et al, 551 F.Supp. 403 (1982) the Court noted at page 406:

> "It has been consistently held moreover, that Section 315 of the Federal Communications Act does not directly or impliedly create a private cause of action for those aggrieved by the actions of a broadcaster...Thus, in the absence of evidence that a fairness doctrine complainant initially availed himself of the administrative procedures set forth in 47 C.F.R. 1.41 (1981) ("Informal requests for Commission action") and thereafter exhausted such steps, the District Court lacks subject matter jurisdiction to adjudicate the matter. 47 U.S.C. 401, 402."

See Lamb v. Griffin Television, Inc., 804 F.Supp. 1430 (W.D. Okl. 1992) (granting motion to dismiss for claimed violation of 47 U.S.C. 315). The case of Maher v. Sun Publications, Inc., 459 F.Supp. 353, 356 (D.C. Kan. 1978) cites Ackerman v. CBS, Inc. 301 F.Supp. 628 (S.D. N.Y. 1969) and Gordon v. N.B.C., 287 F. Supp. 452 (S.D. N.Y. 1968) in concluding:

> "Thus, there seems no question that the primary and exclusive forum in which to institute and prosecute alleged violations of 47 U.S.C. 315 by broadcast licensees is the Federal Communications Commission."
>
> ***
>
> Although the administrative remedy may seem inadequate to plaintiff, it is well established that matters concerning the scope and application of Section 315 should be deferred to the administrative expertise of the FCC."

As the court noted in Ackerman v. CBS, et al, 301 F.Supp. 628 (S.D. N.Y. 1969) at page 631, 632:

> "The Commission is the primary and exclusive forum in which to institute and prosecute alleged violations of Section 315(a) by broadcast licensees. The sole function of the courts in enforcing the statutory provision is to review final orders of the FCC in accordance with the statutory scheme."
>
> ***
>
> "Although plaintiffs allege that they have 'unsuccessfully' appealed to the Commission, they do not aver that

they commenced any proceeding in accordance with the rules and regulations of the Commission, that they sought judicial review of the Commission's denial of relief, or that review is unavailable to them. They have failed to exhaust available administrative procedures under the Act."

Other authorities supporting the exclusiveness of the FCC as the forum requiring exhaustion of administrative remedies are Christian Populist Party v. Secretary of State, 650 F.Supp. 1205, 1211, (E.D. Ark. 1987); Michigan United Conservation Clubs v. CBS News, 485 F.Supp. 893, 903 (W.D. Mich. 1980); Post v. Payton, 323 F.Supp. 799, 802 (E.D. N.Y. 1971).

Petitioner has cited no authority holding that there is a private cause of action to enforce alleged violations of the Communications Act or that it is not necessary for an individual claiming a violation of the Communications Act to exhaust his administrative remedies.

The Court of Appeals was correct in affirming the findings by the District Court that Forbes had failed to exhaust his administrative remedies. The record reveals that "Forbes' first letter to FCC complaining of KHOG defendants censorship of ads" is dated November 2, 1992. (App. Vol. I, p. 65,66) The Amended Complaint which added the private television stations (the KHOG defendants) was filed on the same day, alleging

censorship occurring the previous Friday, October 30, 1992. (App. Vol.1, p.76-81) Petitioner alleged in his Amended Complaint only that he had attempted to call the FCC but that the telephones were not answered. (App. Vol.1, p.78,79) Thus, the record reflects the initial action toward an administrative remedy and this litigation against the private television stations were begun on the same day.

Even where a plaintiff asserts a violation of a federal right, it may be shown that Congress "specifically foreclosed a remedy under 1983 by providing a comprehensive enforcement mechanism for protection of a federal right." DeYoung v. Patten, 898 F.2d 628, 634 (8th Cir. 1990). In DeYoung, supra, the court found that the existence of a comprehensive administrative mechanism to enforce candidates' rights rendered a 1983 remedy for violation of those rights inconsistent with the overall legislative scheme.

To the extent that Mr.Forbes complains about FCC inaction (Pet. for Writ, p.11-15), his argument supports the proposition that the District Court did not have subject matter jurisdiction over his claims. Indeed, this was the Opinion of five Justices below in the Court of Appeals:

> "As a preliminary matter, however, I would hold that the FCC has exclusive jurisdiction of this litigation, including

both the statutory and the constitutional claims, with judicial review in the Court of Appeals and then the Supreme Court. See Telecommunications Research & Action Center v. FCC, 750 F.2d 70, 77 (D.C. Cir. 1984); see also Columbia Broadcasting Systems, Inc. v. Democratic National Comm., 412 U.S. 94 (1973); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969). Forbes should have taken his complaints to the FCC in the first instance. Litigation in the district court is inconsistent with and necessarily undermines the exclusive jurisdiction of the FCC.

***

I also agree that the district court correctly dismissed Forbes's Federal Communications Act claims against the AETN defendants for excluding him from the debate and for refusing him air time and against the private stations for refusing to broadcast his political advertisements except during the safe-harbor hours. Id. at 6. The district court lacked subject matter jurisdiction over these claims. Forbes should have taken these complaints to the FCC first. Forbes did not do so. The FCC has considered complaints involving candidate debates as well as complaints involving anti-abortion advertisements. Then, had the FCC ruled against him, Forbes could have sought judicial review in the court of appeals, not the district court. DeYoung v. Patten, 898 F.2d 628, 633-34 (8th Cir. 1990) (no implied private right of action)."

(App. Vol. 1, p.12,13)

Thus, all the Justices agreed that the District Court properly dismissed Forbes' Complaint. The minority opinion supported dismissal for the additional reason of lack of subject

matter jurisdiction. Therefore, the authorities relied upon by both Mr.Forbes and the minority opinion below clearly establish that review of alleged inaction of the FCC is in the Court of Appeals and not the District Court.

Forbes' argument that he was not required to exhaust his administrative remedies was rejected by both the District Court and the Court of Appeals and by virtually every court which has considered the question. His argument relating to FCC inaction is support for the proposition that the District Court did not have subject matter jurisdiction over his claims. Under either argument, his Petition should be denied.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER'S AMENDED COMPLAINT DID NOT STATE A CAUSE OF ACTION UNDER 42 U.S.C. 1985.

The Amended Complaint, which added the private stations as Defendants, states with regard to a conspiracy allegation:

> "This Complaint embraces and must comprehend a long string of abuses and pattern of continuing conspiracyagainst the people and their rights. The instant case against KHBS TV, et al, as more fully shown, is further proof of the arrogance and malice of this wicked conspiracy against the people and their inherent rights to choose their own representatives based upon their in-

formed consent." (App. Vol.1, p. 80)

The Court of Appeals found that: "We further agree with the district court that there is insufficient substance to Forbes' conspiracy claim to entitle him to relief under 42 U.S.C. 1985." 22 F.3d at 1428. The concurring opinion likewise states:

> "Assuming the district court did have jurisdiction, I agree the district court correctly dismissed Forbes' 42 U.S.C. 1985 civil conspiracy claim because his allegations were too vague...." Forbes, 22 F.3d at 1431.

The Court of Appeals did not decide whether a properly pled conspiracy claim would state a cause of action for a violation of 47 U.S.C. 315 or whether a 1985 remedy would be foreclosed by the comprehensive administrative mechanism of the Federal Communications Act. Presumably, such a remedy would also be foreclosed for the same reason. However, it is clear that where the allegations of a claim are conclusory and devoid of factual basis, dismissal pursuant to Rule12(b)(6) is warranted. McClure v. Esparza, 556 F.Supp. 569 (E.D. Mo. 1983) (aff'd 732 F.2d 162 (8th Cir. 1984)), cert denied, 471 U.S. 1052, 105 S.Ct. 2111, 85 L.Ed.2d 477 (1985). See also Slotnick v. Garfinkle, 632 F.2d 163, 166 (1st Cir. 1980). Accordingly, both the District Court and the Court of Appeals properly found that the Complaint failed to state a claim under 1985.

CONCLUSION

For the foregoing reasons, the Court should deny certiorari.

April 20, 1995 Respectfully submitted.

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In The

Supreme Court of the United States

October Term, 199_

Ralph P. Forbes,

Petitioner

vs.

AETN-TV, KHOG-TV, *et al.*,

Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

PETITIONER's SUPPLEMENTAL BRIEF

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**Memorandum Opinion and Order*, FCC 94-249

Ten Copies Lodged with Clerk of Court

On November 22, 1994, the FCC released its *Memorandum Opinion and Order*, FCC 94-249 to two applications for review: [1] the F.C.C. *Pepper Letter*, 7 FCC Rcd 5599 21 August, 1992, 8210-AJZ/MJM cited in Appendices at 45a, 65a, 67a, 76a, 78a, 91a, 179a, 210a; and [2] the F.C.C. *Becker Letter*, October 30, 1992, DA 92-1503 cited in Petition at 4 & 5; App. 48a, 144a, 145a, 177a, 178a, 179a, 180a, 185a, 187a. This FCC opinion supports granting of certiorari for each and all of the following reasons.

The Commission correctly found that the *Becker* ads were not indecent. (pp 1 ~ 8, ¶1 ~ 12)

Forbes' ads were quite different from Becker's; and prior to the KHOG defendants' censorship of Forbes' ad, Forbes' materials were specifically found not to be indecent by the FCC .

After two years the FCC has ruled in effect that even *if* Forbes' ads were the same as Becker's they could not be censored or banned on grounds of indecency.[1]

* * *

However, the second part of the FCC opinion, FCC 94-249 (pp 8 ~ 12, ¶13 ~ 25), is a frightening exhibit that the unconstitutional camel's nose is now in the tent, and it's pushing hard to evict and supplant the rightful tenant. Petitioner's Cassandra-like forewarning is coming to pass. {Petition at 27 ~ 30, 153a ~ 159a and *passim*.}

Lurking amidst the tangle of high sounding pettifoggeries and obfuscating bureaucratese of the FCC opinion, the steel jawed traps of tyranny and slavery lay waiting for their disarmed prey, the American people stripped of their First Amendment shield and sword.

Licensees may, says the FCC, consider "the potential impact of political advertisements on their audience in making access decisions."[2] (¶15)

---

[1] Moreover, even if Forbes ads were "obscene" and subject to "channeling" to so-called "safe-harbor" hours, KHOG violated Forbes' rights by "channeling" them after 11 p.m., denying him "reasonable access to prime time when access to voters is greatest." App. 78a, P/ 28; FCC 94-249, p 2, n. 4, affirming *Pepper*, App. 47a.

[2] "Access decisions" and "channelling" are insidious euphemisms for censorship, hiding the ugliness of censorship behind these terms makes it no more palatable than a terrorist calling his victims "collateral damage."

This "potential impact" test is precisely the kind of unconstitutional subjective, arbitrary, capricious, overbroad trial that opens the flood gates to unconstitutional burdens and constraints against free expression.

In the instant case, even before this latest atrocious affront against free expression, the respondents considered Forbes' ad would have a powerful, effective impact on the audience, and that is *why* they censored it ... under color of a transparent pretext and patently false claim the ad was "obscene" on the "reasonable, good faith," "expert" "judgment" of the broadcaster.

The FCC opinion says "political advertisements containing graphic abortion imagery" are subject to censorship by a "reasonable, good faith judgment of the broadcaster." (¶18)

This burdening of "graphic abortion imagery" by the FCC hanging a Damoclean sword of censorship over the heads of candidates and placing the knife with thinly veiled instructions to cut the thread in the hands of broadcasters is unconstitutional because:

(1) The government is:

(A) Selecting which issues may be debated;

(B) Tying the hands, gagging the *symbolic* speech and abridging the expression of the Petitioner and Millions of other Americans (App. 225a, 226a);

And (C) Purporting to grant private licensees the power to censor under guise of cloak of government regulation.

WDAY, 360 U.S. 525, 79 S.Ct. 1302 (1959)

(2) The FCC ruling discriminates among candidates based on the subject matter of their expression and is therefore also violative of the Equal Protection Clause. *Mosley*, 92 S.Ct. at 2290 (1972)

(3) The FCC ruling claims to be "neutral" in classifying subject matter as subject to restrictions, but it *de facto* discriminates against a particular viewpoint; in favor of the opposing viewpoint.[3]

[3] Why are some allowed to express themselves by burning flags or desecrating symbols of intrinsic patriotic, cultural or religious values; but Petitioner and other Pro-Life candidates are barred by governmental rules from showing what they and their opponents agree are unanswerable arguments? Can their be any other conclusion but that the government is unlawfully discriminating against them to suppress their viewpoint? Millions think not. Petitioner is coming to this Court because he believes our constitutional rule of law works.

"Although the scope of the prohibition was phrased in general terms and applied to a selected group of speakers, it was obviously directed at spokesmen for a particular point of view ... It was a classic case of viewpoint-based prohibition."

Consolidated Edison Co. v. Public Service Comm'n of N.Y., 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980)

The FCC pretends to wash its hands by the meaningless disclaimer that a licensee who "channels," *ie., censors* political ads "containing graphic abortion imagery cannot do so out of disagreement with candidate's political position." It is hard to imagine someone who is "pro-choice" using "graphic abortion imagery" to promote their position. This form of censorship takes aim solely at the Pro-Life position. To say that censorship is permissible as long as the censor purports it is not motivated "out of disagreement with candidate's political position" is the "logical" equivalent of saying that a terrorist who "lights a fuse and runs" cannot do it if his intention is to explode a bomb," but he may do so if he says he has "good motives."

"As Justice STEVENS observed in *Consolidated Edison Co. v. Public Service Comm'n. of N.Y.*, 447 U.S. 530, 100 S.CT. 2326, 65 L.Ed.2d 319 (1980), however: 'A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a "law ... abridging the freedom of speech, or of the press." A regulation that denies one group of persons the right to address a selected audience on "controversial issues of public policy" is plainly such a regulation.' *Id.*, at 546, 100 S.Ct., at 2333-2334 ... '[t]he First Amendment's hostility to content based regulation extends not only to restrictions on certain viewpoints, but also to prohibition of public discussion of an entire topic, *id.*, at 537, 100 S.Ct., at 2333, we must be particularly wary in assessing (restrictions of speech) to determine whether it reflects an impermissible attempt 'to allow a government [to] control ... the search for political truth.' *Id.*, at 538, 100 S.Ct., at 2333." *FCC v. League of Women Voters of California*, 104 S.Ct. at 3119-3120

Today it is candidates whose views are expressed by what the FCC calls "graphic abortion imagery" who are subject to censorship."

Tomorrow will it be those who espouse free trade? Or those who advocate protection? Those who want to cut the budget? Or

those who want to raise taxes? Those who want to intervene in --- ? Or those who want peace?

Or will the voice that is silenced be the one that warns we have "made government into God and the people into slaves, we have come to a crisis of self-government in America. We have come to a parting of the ways. Down one road lies a totalitarian, utopian vision of freedom lost. Down the other lies lies the founders' vision of self-government regained - and we stand now to choose.

"But do you know what the issues shall be that determine our choice? They shall not be the issues of whether the budget is big or small; they will not be the issue of whether taxes are cut or raised, though these issues are important. They shall be the issues of how we understand our freedom. Is it something we can abuse in any way we choose even at the expense of our dearest principles? Or is it something we must wield with respect for what the founders laid down at the beginning and what no one likes to talk about any more: the laws of nature and nature's God?

"They did not set this country on a course that said, 'We worship our freedom.' They set it on a course that said, 'We worship our God and He gives us our freedom.' "It's time we remembered that."

Alan Keyes, Republican presidential candidate

Petitioner respectfully points out that one of the cases that supports his position was split, but the dissent in *Carey v. Brown*, 447 U.S. at 473, 100 S. Ct. at 2297 (1980) was less with the exposition of the law than with the accuracy of the paraphrasing and selective quotations. The exposition of the law therefore supports Petitioner, but in this case it is the FCC that has based its opinion on illogical distorted paraphrasing and selective quotations.

For example, the FCC opinion misinterprets *Kennedy* (¶22), which was arguably a *bona fide* news exemption case (App. 7a, n. 2) making the equal opportunities right inapplicable. It has nothing to do with the unequivocal prohibition against licensees censoring political expression. The FCC opinion misuses *Kennedy* irrelevantly to make the Orwellian double-speak claim that because the right of the public is paramount, that right is preposterously served, not by providing the people with uncensored access to alternative viewpoints(!); but ludicrously, by "protecting" the people from seeing or hearing ideas the FCC sanctified broadcasters don't think they should know(!). (App. 147a)

The FCC opinion (¶24) reverses the clear intent and language

of the unanimous Court in *WDAY* to claim it means the exact opposite of what the Congress and this Court has said. (*Petition*, 8~10) The FCC opinion says in essence censorship isn't censorship, so long as the FCC says the licensees may censor political speech. The FCC now claims the power to give the licensee the color of authority to censor and muzzle by prior restraint as long as everyone crosses their fingers and repeats Simon says censorship isn't censorship.[4]

The FCC opinion fallaciously asserts *47 USC 315* "relies in the first instance on the good faith discretion of private broadcasting licensees." (¶23) To the contrary of this schizophrenic sophistry, the Act was enacted in 1927 because Congress knew, and for most of its history the FCC agreed, it was folly to rely on the good faith discretion of private broadcasters. (App. 148a~150a) That is why the act forbids them to censor political speech. That is why this Court declared the FCC could not censor, nor could private broadcasters, nor could the FCC provide a cloak. (*Petition* 8 ~ 10)

When Congress and the FCC enforced the equal opportunity and no censorship provisions of *47 USC 315* they created limited forum for a specific purpose for the benefit of all candidates and the public. The FCC opinion has foreclosed the unabridged, equal right of petitioner and those who espouse his viewpoint from that forum.

Limiting expression and its parameters to a privileged caste of *nomenklatura* as the virtual surrealism of the FCC ruling proposes to do only leads to cynicism and alienation of the "channeled" people from the self-anointed elite:

"Shock among media pundits when (tabu or forbidden issues become) part of a public debate about public policy speaks volumes about a mindset that thinks it should decide what issues others dare to talk about." Dr. Thomas Sowell, senior fellow at Hoover Institution, Stanford University, April 30, 1995

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[4] Reading Part II of the FCC Opinion 94-249, certain scriptures come to mind paralleling FCC faithfulness to the First Amendment, including:

For there is no faithfulness in their mouth; their inward part is very wickedness; their throat is an open sepulchre; they flatter with their tongue.

Psalms 5:9 & 140:3;

And, "Then the Lord said, 'Because this people draw near with their words And honor Me with their lip service, But they remove their hearts far from Me, And their reverence for Me consists of tradition learned [by rote,]'"

Isaiah 29:13 (NASB)

A pseudo-politically "correct" ambience engendered by a media elite that has no comprehension nor love for our venerable roots has spawned such an abysmal ignorance of our constitutional heritage that during the 1976 bicentennial large numbers of College students refused to sign petitions that were direct quotes from the *Declaration of Independence* because they deemed the words to be "radical," "militant," "subversive," "un-American," etc.

In such an atmosphere could Patrick Henry, Samuel Adams, Thomas Paine, James Madison or even Thomas Jefferson succeed in having their views expressed uncensored by FCC sanctioned broadcasters? Sadly the answer is probably not.

The respondents, with FCC support, have already censored Thomas Jefferson. (App. 53a)

Hiding behind the subterfuge of Orwellian slogans, covered by the noise of clanging brass and noisome lip service to First Amendment principles lies the masked terrorist threat against free speech, armed with "good faith" shields and cunning cudgels mislabeled under the pretext: "protect the children."

"Protect" the children? By robbing them of their First Amendment heritage!

It is true that photographs of babies who have been the victims of abortion are painful to look upon. And it is also agonizing and heartbreaking to see the victims of wars, persecution, crime, accidents, natural disasters or terrorism: whether in Lebanon, Jerusalem, Cambodia, Londonderry, London, New York City or Oklahoma City.

There is no doubt that children (and adults) were greatly disturbed by the poignant picture of the Oklahoma City fireman carrying the maimed body of a small child. Yet, there was no "channeling" of all the horrifying pictures and news of that terrible tragedy.[5-A]

[5-A] Would a court uphold a rule that forbade any reports of the tragic story of a woman who admitted drowning her two small sons? Surely a case could be made that hearing that horror story could traumatically undermine a small child's trust in the bedrock security of maternal love. And it may be argued that children are exposed to the idea of abortion, and that the knowledge that there are those who oppose it would be comforting and assuring, as opposed to thinking that all of society was totally heartless and devoid of natural affection, so that human life, especially small human life had little or no value.

It was a blessing that news of this terrible tragedy was not suppressed. In fact the image of that child, those children, united the American people in their compassion for the victims and indignation and contempt for the evil coward(s) who committed that abominable crime. If the news had been blacked out isn't it possible a major suspect would have been let loose? Would potential victims be deprived of fair warning? Or would rumours and panic result from distorted grapevine communications? Clearly freedom of the press disseminating accurate news, showing the heroism and sacrifice of volunteers, was a silver lining in a very dark sky.

Conversely, history has shown that a traumatic tragedy can like a "Reichstag fire" be used by those in power to justify a restriction on liberties, the disenfranchisement, suppression and persecution of dissidents and political opponents. A truly Free Press and a Court and a People vigilantly aroused at the slightest encroachment or censorship under any guise or euphemism, no matter how small or apparently benign is our first line of defense against such foul attempts at tyranny. (App. 98a; 235a).

And if such a despotism were ever established it would entrench itself by controlling and censoring all expression. Eventually, it would destroy itself whether in a bang or a whimper; but at what price? How much better to sound a clear trumpet now, censorship in whatever cloak, form or disguise will not be tolerated in the United States of America.

"Government is not reason; it is not eloquence; it is force! Like fire, it is a dangerous servant and a fearful master."

George Washington

Recently, in its its frantic zeal to "do something" to "fight crime" an overzealous congress almost passed legislation purporting to have authority to repeal the 4th Amendment *verbatim*.

5-B There has been little or no censorship of the news concerning: the mass murders and genocide in Rwanda, Bosnia, Chechnya, the starving children in Somalia, Haiti, etc.; the destruction of WW-II; Kent state; the Vietnam war to name just a few events recently shown with disturbing "graphic imagery." But because of the brutal truth of starving children, many were fed and many lives were saved and improved. Only those who would want war, or death camps, or open warfare in our streets would want to censor the bitter reality of such atrocities.

To protect us from our own passions and follies, is that not why we have the independent Courts?

There may be some on the Court who disagree, perhaps greatly, with the Pro-Life views of the petitioner; but if this be so, is that not all the more reason to affirmatively protect the infringed speech in this case?

"I disapprove of what you say, but I will defend to the death your right to say it." Voltaire (Francois Marie Arouet), Attributed

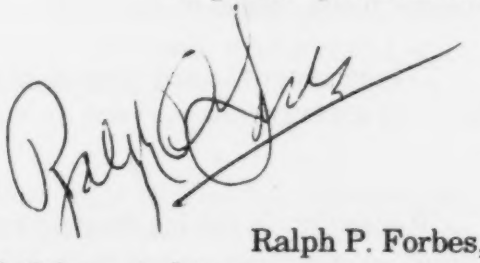
"If there is any is any principle in the Constitution that more imperatively calls for attachment than any other it is the principle of free thought ~ not free thought for those who agree with us but freedom for the thought that we hate."

Justice Oliver Wendell HOLMES, Jr.
United States v. Schwimmer, 279 U.S. 644 at 653 (1928)
App. 87a and *passim.*

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted



Ralph P. Forbes,
Petitioner in his own proper person